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THE
RULE AGAINST PERPETUITIES.

THE
RULE AGAINST PERPETUITIES

A Treatise on
REMOTENESS IN LIMITATIONS,

WITH A CHAPTER ON
ACCUMULATION AND THE THELLUSON ACT.

BY
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PREFACE.

I HAVE endeavoured to present in a convenient form a statement of the law and cases relating to perpetuities and accumulation. The history and development of the Rule against Perpetuities I have very slightly touched upon; that subject being exhausted by the classical work of Mr. Lewis and the fully reported arguments of Mr. Hargreaves, Mr. Preston, and Sir E. Sugden in *Thelluson v. Woodford* and *Cadell v. Palmer*. The length of time that has elapsed (nearly forty years), and the heavy crop of cases that has sprung up, since the publication of a work dealing specially with Perpetuities appeared to me to point to a want which this treatise attempts to supply.

The following pages will give some indication of the extent to which I am indebted to the works of Mr. Lewis, Mr. Jarman and his editors, Mr. Tudor, and Mr. Davidson; I desire here to acknowledge more fully the obligations I am under to those writers.

A second reference, to the *Law Journal* or other contemporary Report, is given whenever a case is reported in more than one publication.

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THE RULE AGAINST PERPETUITIES.

CHAPTER I.

STATEMENT OF THE RULE AGAINST PERPETUITIES; ORIGIN,
SCOPE, LIMITS, AND APPLICATION OF THE RULE.

THERE have been many attempts to define a perpetuity. Chap. I.
In Sanders on Uses and Trusts (*a*) it is defined as “a Perpetuity ;
what it is ;
definitions.
future limitation, restraining the owner of the estate from alienating the fee simple of the property, discharged of such future use or estate, before the event is determined, or the period arrived, when such future use or estate is to arise. If that event or period be within the bounds prescribed by law, it is not a perpetuity.” In a recent case (*b*) this definition was accepted by Kay, J., and by Jessel, M.R., in the Court of Appeal. A more complete definition is that supplied in Lewis on Perpetuities (*c*): “A perpetuity is a future limitation, whether executory or by way of remainder, and of either real or personal property, which is not to vest until after the expiration of, or which will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests; and which is not destructible by the persons for the time being entitled to the property subject to the future limitation,

(*a*) Vol. I., p. 204, 5th ed.

562; 51 L. J. Ch. 193, 530.

(*b*) *London and South Western
Railway Co. v. Gomm*, 20 Ch. D.

(*c*) p. 164.

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except with the concurrence of the individual interested under that limitation." This definition also was referred to with approval by Jessel, M.R., in the case above mentioned. It is, perhaps, as accurate a definition of a perpetuity as can be framed (*d*).

Owing to the complexity of the Law of Property, and to the fact that the Rule against Perpetuities was introduced into it at a comparatively recent period of its history, there is the greatest difficulty both in stating the Rule with precision and in applying it with certainty. Its general scope and aim, nevertheless, are clear. The evil against which it is directed is, the suspense, beyond a reasonable time, of the absolute ownership of property, and of the power of alienation which accompanies ownership. It is a rule in favour of alienation, and carries out the general principle that all property is alienable, though to a certain extent, and in a particular way, it may be made inalienable (*e*).

Origin and
history of the
Rule against
Perpetuities.

The history of the Rule against Perpetuities illustrates the anomalous way in which the law of this country is produced. Like the restraint upon anticipation which attaches to the separate property of a married woman, it is "an invention of the Chancellors" (*f*). It is to be found in no Act of Parliament, and it exists independently of statute law. As stated above, it is of comparatively recent origin, and, in its present shape, did not exist until the Statute of Uses created, or brought into prominence, the evil which it is intended to meet. At the foot of this chapter (*infra*, p. 36) is a short statement of the origin and history of the Rule, taken from Butler's note to Fearne's Contingent Remainders. For a detailed account of the law with regard to alienation prior to the introduction of

(*d*) Other definitions will be found in Lewis on Perpetuities, pp. 163, 164; Gilbert on Uses, by Sugden, 3rd ed., 260, note.
(*e*) See per Jessel, M.R., *In re*

Ridley, 11 Ch. D. 645, 649; 48 L. J. Ch. 563.

(*f*) See per Jessel, M.R., *In re Ridley*, *ubi supra*.

the Rule the reader is referred to Lewis on Perpetuities, Chap. I.
pp. 1—162.

The Rule having been invented to cope with the evils incidental to shifting uses and executory devises is usually to be found stated in connection with that kind of limitation. "An executory devise," said Cresswell, J., in *Dunghannon v. Smith (g)*, "to be valid, must be so framed that the estate devised must vest, if at all, within a life or lives in being and twenty-one years after. It is not sufficient that it may vest within that period; it must be good in its creation; and unless it is created in such terms that it cannot vest after the expiration of a life or lives in being, and twenty-one years, and the period allowed for gestation (*h*), it is not valid, and subsequent events cannot make it so." Again: "The Rule is that a shifting or springing use or an executory devise may take effect (*i*) within a life or lives in being and twenty-one years after the decease of the survivor, and also during the period of gestation, if gestation exists; but if the springing or shifting use, or executory devise, be so framed, as that it may in any event exceed this limit, then the whole is void for remoteness, as tending to a perpetuity" (*k*).

With regard to personal property, the Rule is stated in similar terms by Lord Kenyon (*l*): "The limitations of personal estate are void unless they necessarily vest (if at all) within a life or lives in being at twenty-one years, and nine or ten months afterwards." And in a recent case (*m*) it was stated generally by Jessel, M.R.: "Property cannot be tied up longer than for a life in being and twenty-one years after. That is called the Rule against Perpetuities."

(*g*) 12 Cl. & F. 526, 563; 10 Jur. O. S. 721.

(*h*) As to gestation, see *infra*, p. 35.

(*i*) As to the time at which a limitation takes effect or vests, see *infra*, p. 39, *seq.*

(*k*) Williams on the Settlement of Real Property, p. 30.

(*l*) In *Jee v. Audley*, 1 Cox. 324, 325.

(*m*) In *re Ridley*, 11 Ch. D. 645, 649; 48 L. J. Ch. 563.

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Perpetuities
illegal in the
colonies.

Bequest to be
applied in es-
tablishing a
perpetuity
abroad.

Disposition to
which the
Rule applies.

The Rule
applies to
common law
limitations :
to conditions.

The Rule against Perpetuities, being founded upon considerations of public policy which are of wide, if not universal, application, is the law not only of England, and applicable to property in England, but of the British colonies, and, it seems, throughout the Queen's dominions, wherever the general law of England prevails. It has, for example, been applied to a devise, contained in the will of a testator domiciled in Penang, of land situate in Penang (*n*). But it is no part of the law of Scotland. And in the case of a bequest by the will of a domiciled Englishman of money, payable in England, to be laid out in the purchase of lands in Scotland, which were directed to be settled in a manner which, by the law of England, would have been illegal on account of remoteness, it was held by Lord Cottenham that the bequest of the money and the trust to buy and settle land was valid (*o*).

With certain exceptions, mentioned below, the Rule against Perpetuities applies to every disposition of property, whether by way of limitation to a person directly, or in exercise of a trust or power, or by way of trust; whether it be at law or in equity; whether by deed, will, or other instrument; and whether the property be real or personal.

The Rule being, as appears above, of comparatively recent origin, the question has arisen whether it applies to common law limitations, such as limitations upon condition, which were in use before the Rule, in its present shape, existed. By the common law there appears to have been no limit of time within which a right of entry for condition broken could arise (*p*). There can be little doubt that at the present day a condition attached to a limitation in fee of real property would be void for remoteness, unless its operation were confined to the legal period. In a

(*n*) *Yeap Cheah Neo v. Ong Cheng Neo*, L. R. 6 P. C. 381. See also *McKean v. McKay*, L. R. 5 P. C. 327.

(*o*) *Fordyce v. Bridges*, 2 Ph. 497,

515.

(*p*) For instances of remote conditions, see *Coke upon Littleton*, 214, b; 223, a.

recent case (*q*) there was a devise of land to A. in fee "on the condition that he never sells it out of the family." Sir G. Jessel, M.R., first considered whether the condition was void for remoteness: "First of all it is to be observed that the condition, good or bad, is confined within legal limits. It is applicable merely to the devisee himself, and therefore is not void on any ground of remoteness." The Master of the Rolls clearly was of opinion that, if its operation had not been confined within the legal limit, the condition would have been void for remoteness.

Although the benefit of a condition can be taken only by the grantor or donor and his heirs, and not by a stranger (*r*), the evil, as regards the suspense of the ownership of land limited upon condition, is identical with that to which the introduction of executory uses gave rise, and to cope with which the Rule against Perpetuities was invented.

A condition or qualification annexed to the exercise of a mortgagee's power of sale, or to the exercise by an owner of minerals of a right, created by license or grant from the surface owner, to let down the surface, may, it seems, operate at any distance of time. Thus where, in the one case, a rent-charge was to arise to the mortgagor (*s*), and in the other, the surface owner was to be entitled to compensation for injury to the surface (*t*), the rent-charge and right to compensation were held to be well created. And it will be seen below (*u*) that a condition, proviso, or covenant, in a lease not to alienate without the license of the lessor, is not void for remoteness, whatever the duration of the term.

(*q*) *In re Macleay*, L. R. 20 Eq. 186; 44 L. J. Ch. 441. See also *Lewis on Perp.* 616; 1 *Sand. Uses*, 207, 213 (5th ed.); and per *Brougham, C.*, *Keppell v. Bailey*, 2 M. & K. 517.

(*r*) *Co. Lit.* 379, a; *Butler's note*, F. C. R. 381, a.

(*s*) *Gilbertson v. Richards*, 5 H. & N. 453; 28 L. J. Ex. 158. See *Sugd. Pow.*, 8th ed., p. 16; and per *Kay, J.*, 20 Ch. D. 572.

(*t*) *Aspden v. Seddon*, L. R. 1 Ex. D. 497; 46 L. J. Ex. 353.

(*u*) *Infra*, p. 7.

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In *Goodman v. Mayor of Saltash* (x) it was held by the House of Lords (Lord Blackburn dissenting) that there may be a grant to the corporation of a borough by the Crown of a several oyster fishery, subject to a condition that a particular class of the inhabitants of the borough should have the right of fishing during part of the year; and that such a condition would not be void for perpetuity, but would take effect, either, as a charitable trust, or as an exception from the grant.

Condition repugnant to estate limited; condition not to alien.

It will be convenient here to notice that a limitation of real or personal property in terms which pass the fee simple, or the absolute interest, cannot be cut down by annexing a condition that the taker shall not alienate. "If a man make a feoffment in fee, upon condition that he shall not alien, this condition is repugnant and against law, and the state of the feoffee is absolute" (y). The condition here is void as being repugnant to the estate in fee simple of which the power of alienation is an incident. "For if such a condition should be good, then the condition should oust him of all the powers which the law gives him; which should be against reason; and, therefore, such a condition is void" (z). Elsewhere Lord Coke states that: "If A. be seised of Blackacre and B. enfeoffeth him of Whiteacre, upon condition that he shall not alien Blackacre, that condition is good" (a). Such a condition would, at the present day, probably be held void as an undue restraint upon trade (b). If the condition were, that he and his heirs shall not alien Blackacre, it would, probably, also be void for perpetuity.

On the same ground of repugnancy, an executory limitation, to take effect on alienation by a person to whom an estate in fee simple, or the absolute interest in personalty,

(x) 7 Ap. Ca. 633.
(y) Co. Lit. 206, b.; *ibid.*, 223, a;
and see *Collins v. Plummer*, 1 P. W.
104; Touchst. 129.
(z) Co. Lit. 223, a.

(a) Co. Lit. 223, a; Touchstone,
129.
(b) See Smith's L. C., 8th ed.,
448.

is limited, is invalid. "Any executory devise to take effect on an alienation, or on an attempt at alienation, is void, because the right of alienation is incident to every estate in fee simple as to every other estate" (c). Except in the case of a married woman's separate property the law does not permit the enjoyment of property to be separated from the power of alienation. With the one exception mentioned above every restraint or fetter on alienation attached to a limitation of real or personal property is void for repugnancy and inoperative (d).

A right of re-entry reserved to the lessor upon breach of a condition or covenant against assignment of the term in a lease for years has never been treated as a restraint upon alienation, so as to be open to the objection of repugnancy or remoteness (e).

A condition not to alien except to certain persons, or to a specified class of persons, is not void for repugnancy, provided the power of alienation is not substantially taken away (f). But the condition would, it seems, be void for perpetuity unless its operation were restricted to the legal period (g).

A limitation to a person absolutely, with an invalid restriction upon alienation, must be distinguished from a limitation until alienation, and upon alienation to a stranger. In the latter case, if the primary limitation is

(c) Per Fry, J., *Shaw v. Ford*, 7 Ch. D. 669, 674; 47 L. J. Ch. 531.

(d) See *Bradley v. Peizoto*, 3 Ves. 324; *Brandon v. Robinson*, 18 Ves. 429; *Ware v. Camm*, 10 B. & C. 433; *Youngehusband v. Gisborne*, 1 Coll. 400; *Green v. Spicer*, 1 R. & M. 395; *In re Machu*, 21 Ch. D. 838; as to restraints upon barring estates tail, *Mainwaring v. Baxter*, 5 Ves. 457; *Dawkins v. Lord Penrhyn*, 6 Ch. D. 318; 4 Ap. Ca. 51; 48 L. J. Ch. 304.

(e) There seems to be no founda-

tion for the doubt expressed by Bul-
ler, J., in *Roe d. Hunter v. Galliers*,
2 T. R. 133, 140.

(f) Co. Lit. 223, b.; *Doe d. Gill*
v. Pearson, 6 East. 173; *In re*
Macleay, L. R. 20 Eq. 186; 44 L. J.
Ch. 441; *Attwater v. Attwater*, 18
Beav. 330; 23 L. J. Ch. 692, is dis-
tinguishable from *In re Macleay*; see
the judgment of Jessel, M.R. See
also *Billing v. Welch*, Ir. Rep. 6 C.
L. 88; *In re Quin*, 8 Ir. Ch. Rep.
578, as to *Attwater v. Attwater*.

(g) *Supra*, p. 5.

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for life, the limitation over is valid (*h*). Whether a limitation in fee to A. until he shall alienate is valid, has not been expressly decided (*i*). The subject of conditional limitations is considered below, p. 70.

Rent-charge
or term of
years to arise
in future.

The limitation of a rent-charge or a term of years to arise certainly, or by possibility, more than twenty-one years after the expiration of lives in being, is too remote (*k*). It has been suggested that, if the grantee is a person in being at the date of the limitation or ascertained within the legal period, the limitation is good (*l*). But there is no valid ground for this distinction (*m*).

Validity of
a contract not
to alienate.

Contracts relating to lands, and creating in favour of one of the parties an interest in the lands that does not vest within the legal period, are obnoxious to the Rule against Perpetuities. Contracts not operating as a disposition of the lands, but merely restrictive of the use of the lands, are on a different footing, and will be considered below (*n*). Whether a contract by the owner of land in fee that he and his heirs will not alien is valid or void, either for perpetuity or as an undue restraint upon trade, is not clear. Coke (*o*) thought it valid: "If the feoffee be bound in a bond that he or his heirs shall not alien, that is good; for he may notwithstanding alien, if he will forfeit his bond that he himself hath made." That such a contract will not bind the land either at law or in equity in the hands of an assign of the covenantor is clear (*p*). A contract by tenant in tail, that he and the heirs of his

(*h*) *Lockyer v. Savage*, 2 Str. 947; *Graves v. Dolphin*, 1 Sim. 66; *Oldham v. Oldham*, L. R. 3 Eq. 404; 36 L. J. Ch. 205.

(*i*) See *In re Machu*, 21 Ch. D. 838.

(*k*) Butler's note, F. C. R. 528; Lewis on Perp. 608, *seq.*

(*l*) See *Keppell v. Bailey*, 2 M. & K. 517; *Gilbertson v. Richards*, 4 H. & N. 277, 297; 5 H. & N. 453; 28 L. J. Ex. 158; *Birmingham Canal Co. v. Cartwright*, 11 Ch. D.

421; 48 L. J. Ch. 552.

(*m*) *London and South Western Railway Co. v. Gomm*, 20 Ch. D. 562; 51 L. J. Ch. 530; overruling the cases last cited.

(*n*) *Infra*, p. 16.

(*o*) Co. Lit. 206, b; see also *Shep. Touchstone*, 131; Butler's note, Co. Lit. 379, b.

(*p*) See *McLean v. McKay*, L. R. 5 P. C. 327, 334; 29 L. T. N. S. 352.

body will not disentail, was in *Collins v. Plummer* (q) held not to bind the land; but the Court seems to have considered the covenant valid. In *Poole's case* (r) A. enfeoffed B. in tail, remainder to C. in tail, and A. B. and C. each entered into a statute with the others that he would not alien. The statutes were ordered to be cancelled, as in substance making a perpetuity. An executory limitation taking effect on alienation by tenant in tail (s) or in fee (t) is, as we have already seen, void for repugnancy. On the whole there seems reason to suppose that at the present day a contract not to alien would be held void as an undue restraint upon trade (u).

In *Birmingham Canal Company v. Cartwright* (x), Of contracts giving a right of pre-emption. there was a conveyance in fee upon the sale of surface lands, the vendor being entitled to the mines under the land. In the conveyance was contained a covenant by the vendor, for himself, his heirs, executors, administrators, and assigns, with the purchaser, his heirs and assigns, that he, the vendor, his heirs and assigns, would, on selling or agreeing to sell certain adjoining lands, to which he was entitled, at any time thereafter, give to the purchaser, his heirs and assigns, the refusal, at a price to be then ascertained, of the mines under the lands conveyed. Fry, J., held that the covenant was not void for remoteness, and that it could be enforced by an assign of the purchaser against the devisees of the vendor. But in *London and South Western Railway Company v. Gomm* (y), lately before the Court of Appeal, it was held that such a covenant creates an interest in land which is void for remote-

(q) 1 P. W. 104.

(r) Moore, 810; see also *Jervis v. Bruton*, 2 Vern. 251, where a bond by tenant in tail not to commit waste was held void. *Freeman v. Freeman*, 2 Vern. 233, where relief was refused against a bond not to dock an entail depends upon special circumstances.

(s) *Mainwaring v. Baxter*, 5 Ves.

457.

(t) *Shaw v. Ford*, 7 Ch. D. 669, 674; 47 L. J. Ch. 531.

(u) See 1 Smith's L. C. (8th ed.), 448; *McLean v. McKay*, *ubi supra*.

(x) 11 Ch. D. 421; 48 L. J. Ch. 552.

(y) 20 Ch. D. 562; 51 L. J. Ch. 530.

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ness; and the decision of Fry, J., in *Birmingham Canal Company v. Cartwright*, was expressly overruled. In *Stocker v. Dean* (z), Romilly, M.R., was of opinion that a contract by A., for himself, his heirs and assigns, purporting to give a right of pre-emption at all times thereafter to B., his heirs and assigns, could not be enforced after the death of A.

In *Hope v. Mayor and Corporation of Gloucester* (a), lands were conveyed to a municipal corporation, and the corporation by the deed of conveyance covenanted with the grantor that when a term then subsisting in the lands should expire, if any of the heirs of the body of a person named in the deed, being kindred of the grantor, should so request, the corporation and their successors would then, and as often as any such chance should fall, make a new lease to the person so requesting for thirty-one years, at a rent specified. It was held that the covenant was void for perpetuity.

In *Briggs v. Earl of Oxford* (b), lands were settled by a father tenant for life in possession, and a son tenant in tail in remainder, upon trust for the father for life, remainder to the son for life, remainder to the son's first and other sons in tail, and a power was given to trustees to cut timber and apply the proceeds in paying off existing incumbrances on the estates, so long as any incumbrances remained. The power was supported by Cranworth, C., partly on the ground that it was, in effect, created in pursuance of a contract between the settlors that the incumbrances should be liquidated in a particular manner, and that to whatever length of time the contract extended, it was not within the scope of the Rule against Perpetuities: "The person who enjoys the estate has only to pay off the incumbrance, and there is an end of it."

(z) 16 Beav. 161, 165.

(b) 1 D. M. & G. 363, 370; 21

(a) 7 D. M. & G. 647; 25 L. J. L. J. Ch. 829.
Ch. 145.

The application of the Rule against Perpetuities to contracts will be further considered below in connection with the equitable doctrine by which contracts of a certain class affect the land in the hands of an assign with notice from the covenantor, and operate, in fact, as an equitable limitation creating an interest in the land (c).

The Rule against Perpetuities does not apply to trusts in favour of charity; to the trust of an advowson held in trust to present the nominee of the inhabitants of the parish as the living from time to time falls vacant; to conditions implied by law, as in the case of an exchange or partition under the old law (d), or upon a grant to a corporation; to easements; to covenants for renewal in leases for lives; to a right of entry, or a power of distress for securing a rent-charge; to the power of sale in a mortgage, or to a condition annexed to such a power; to limitations after or collateral to an estate tail, which from the date of their creation to the time of taking effect are barrable by the tenant in tail; to restrictions on the use of land created by contract; and (probably) not to limitations of real estate by way of remainder expectant upon estates limited to persons in being; and probably not to limitations of interests in real estate, such as terms of years of short duration, which must come to an end before the period allowed for the vesting of limitations by the Rule has expired. Perpetuities exist also in the case of corporations having power to take and hold property, so that it will pass to their successors for ever, without power of alienation; and various other statutory perpetuities have, from time to time, been created by the Legislature (e).

Dispositions to which the Rule does not apply.

The reasons for these exemptions from the operation of

(c) *Infra*, p. 16.

(d) Previously to 8 & 9 Vict. c. 106, s. 4: As to these conditions, see *Shep. Touchstone*, 126; 2 *Bacon's Abridg.* 186; as to a grant to a corporation, *Shep. Touchstone*, 117,

note (b); *Co. Lit.* 13, b. A shifting use operating in case of eviction from land taken in exchange upon other land is void; *Sugd. Pow.*, 8th ed., 44.

(e) See *infra*, p. 21.

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the Rule against Perpetuities are various. Some limitations, such as charitable trusts, are excepted on the ground of public policy. Others, such as limitations destructible by a prior tenant in tail, on the ground that, notwithstanding the apparent remoteness of the limitation, the property is not thereby made alienable. These will be fully considered hereafter.

Powers of sale in a mortgage, and powers of distress and entry to secure a rent-charge or money lent on mortgage, appear to be exempt as being part of, or incident to, the estate and interest of the mortgagee or owner of the rent-charge (*f*).

Restrictions upon the use of land and various incidents attaching to the ownership or possession of land may be created by contract. Such contracts are enforceable in equity against successive owners, taking the land with notice of the contract, without regard to the Rule against Perpetuities. A, the purchaser of the fee, covenants for himself, his heirs and assigns, with B., the vendor, his heirs and assigns, that the land shall never be built upon (*g*). The covenant is binding in equity upon A.'s successors in title, having notice of it, for all time. The argument that such agreements are objectionable on the ground of perpetuity has never prevailed.

The question whether a covenant by the owner of land is enforceable in equity against succeeding owners of the land taking with the notice is independent of the question whether it runs with the land at law (*h*). Whether the burden of a covenant can in any case, except where the relation of landlord and tenant exists, run with the land at law is doubtful. In view of several dicta in favour of covenants so running with the land (*i*), the law on the

(*f*) See *infra*, p. 248.

(*g*) Sugd. V. & P., 14th ed., 596 ;
Ex parte Ralph, 1 De G. 219 ;
Bewley v. Atkinson, 13 Ch. D. 283,
289 ; 49 L. J. Ch. 153. As to
these contracts generally, see Pol-

lock's Principles of Contract, 3rd
ed., pp. 241—248.

(*h*) *Tulk v. Moxley*, 2 Ph. 774 ;
18 L. J. Ch. 83.

(*i*) Per Romilly, M.R., in *Morland*
v. Cook, L. R. 6 Eq. 252, 267 ;

Interests in
land arising
under con-
tracts.

subject cannot be considered as settled; but the better opinion is that the burden of a covenant can in no case run with the land at law (*k*).

A covenant by the owner of land imposing on the land a burden in the nature of an easement may, it seems, operate as a grant of an easement over the land (*l*). No objection on the ground of remoteness or perpetuity can be raised to such a covenant.

Covenants which run with the land at law closely resemble easements; and, like easements, appear to be an exception from the Rules against Perpetuities.

Covenants running with the land at law.

As between lessor and lessee both the benefit and the burden of covenants which touch and concern the thing demised run with the reversion and with the term. There is an exception where the covenant relates to a thing not in existence at the date of the demise (as a wall to be built on the land by the covenantor); in which case the burden of the covenant will not run with the lease unless assigns are named in the covenant (*m*).

Covenants which do not touch or concern the land demised in no case run with the land at law.

Of covenants which touch and concern the land, and therefore run with the land as between lessor and lessee, the following are examples. A covenant to pay rent; to repair; to cultivate in a particular manner; to reside; to grind corn grown on the land at the lessor's mill; to leave the land stocked with game; (and probably) a covenant not to carry on a particular trade on the premises; not to assign without license; and to buy all beer to be sold on the premises of the lessor. The burden of covenants by the lessor to renew the lease, and to supply the demised

Western v. McDermott, L. R. 1 Eq. 499, 506; per Malins, V.-C., *Cooke v. Chilcott*, 3 Ch. D. 694; and see Sugd. V. & P., 14th ed., 577, seq.

(*k*) See 1 Smith's Lead. Ca., 8th ed., 103, 104; Pollock's Principles of

Contract, 3rd ed., 243.

(*l*) *Rowbotham v. Wilson*, 8 H. L. C. 362; 2 L. T. N. S. 642; *Low v. Innes*, 10 Jur. N. S. 1037; Gale on Easements, 5th ed., 85.

(*m*) *Spencer's case*, 3 Coke, 29.

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premises with water, have been held to run with the reversion (*n*).

Covenants which do not touch or concern the thing demised, and covenants relating to something not in existence at the date of the demise (as a wall to be built by the lessee), and in which assigns are not named, do not run with the land at law. The following covenants are held not to touch or concern the land: covenants by the lessor to pay a valuation on trees planted, or on improvements made, by the lessee; to give the lessee an option of pre-emption over land adjoining that demised; not to keep a beershop within a certain distance of the demised premises; covenants by the lessee to pay part of the lessor's expenditure on improvements; not to employ a specified class of persons on the premises; to deliver up chattels not fixed to the premises at the end of the term (*o*).

Option to purchase the reversion in a lease.

A recent case (*p*), deciding that a covenant, by a purchaser of the fee, that the vendor and his assigns shall for ever have a right of pre-emption, is void for perpetuity, raises a doubt as to the validity of a covenant, sometimes to be found in leases, enabling the lessee and his assigns during the continuance of the lease to purchase the reversion at a price named. Unless a distinction can be drawn on the ground that it runs with the land (*q*), it would seem to follow from the case above mentioned that such a covenant in a lease for more than twenty-one years is void for remoteness. It resembles, however, in some respects a covenant for perpetual renewal; which, as appears below, is undoubtedly valid.

(*n*) The authorities, together with many other examples of covenants running with the land, will be found in Woodfall's Landlord and Tenant, 12th ed., 148, *seq.* See also 1 Smith's L. C., 8th ed., 68, *seq.*

(*o*) See Woodfall's Landlord and Tenant, 12th ed., 151.

(*p*) *London and South Western*

Railway Co. v. Gomm, 20 Ch. D. 562; 51 L. J. Ch. 530.

(*q*) As is probably the case, though there appears to be no express authority on the point. As to the nature of such an option, see *Buckland v. Papillon*, L. R. 1 Eq. 477; 2 Ch. 67; 35 L. J. Ch. 387; 36 L. J. Ch. 81.

Covenants in leases for lives for perpetual renewal run with the land, and are not objectionable on the ground of remoteness. "The notion of" such covenants "being objectionable on the ground of remoteness is out of the question" (r). They are treated as an exception from the Rule against Perpetuities (s). In Ireland, where they are common, their validity has always been assumed (t).

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Covenants for renewal in leases for lives.

But a covenant for perpetual renewal to members of a particular family would, it seems, be void for remoteness (u).

As regards its capacity for running with the land, a condition determining the lease, or a condition of re-entry, is on the same footing with a covenant. A condition will run with the land if it touches or concerns the land, and not otherwise. Thus a condition determining the lease upon conviction by the tenant of an offence against the game laws has been held not to run with the land (x). But it has been held that a condition for re-entry upon the bankruptcy of the lessee or his assigns is valid, and that the benefit of it runs to the assigns of the lessor (y). A condition that runs with the land cannot, it seems, be void for remoteness (z).

Conditions for re-entry in leases.

It seems doubtful whether a covenant that does not run with the land as between landlord and tenant is enforceable in equity against an assign of the lessee (a). The ordinary brewer's covenant by the lessee of a public house not to deal for beer except with the lessor is, perhaps, an example of such a covenant. It has been enforced against

(r) Per Wood, V.-C., 4 K. & J. 45; and see *Walmesley v. Pilkington*, 35 Beav. 362.

(s) Per Jessel, M.R., 20 Ch. D. 562, 579. From *Moore v. Clench*, 1 Ch. D. 447; 45 L. J. Ch. 80, it appears that the equitable interest arising under such a covenant vests upon the execution of the covenant.

(t) See *Pollock v. Booth*, 9 Ir. Rep. Eq. 229; *ib.* 607. See further as to the nature of such property, *Calvert v. Gason*, 2 Sch. & Lef. 561; *Copinger v. Gubbins*, 3 J. & Lat. 397, 411.

(u) See *Hope v. Mayor, &c., of Gloucester*, 7 D. M. & G. 647; 25 L. J. Ch. 145; see also *Pollock v. Booth*, *ubi supra*.

(x) *Stevens v. Copp*, L. R. 4 Ex. 20; 28 L. J. Ex. 175, *dub.* Kelly, C.B.

(y) *Roe d. Hunter v. Galliers*, 2 T. R. 133.

(z) Notwithstanding the dictum of Buller, J., in *Roe v. Galliers*, *ubi supra*.

(a) See per Brougham, C., 2 M. & K. 548.

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a purchaser with notice (*b*); and it would seem to be a purely personal covenant, not touching the land (*c*).

This particular covenant could not be void for perpetuity (*d*), but it seems probable that other covenants binding the term in the hands of an assign with notice, and not running with the land (if any such there be), would be invalid, unless their operation is limited to the legal period. And every assign of a term has notice of the covenants in the lease (*e*).

Covenants will run at law with incorporeal hereditaments, such as a license to mine (*f*); but not with a chattel (*g*).

Restrictions
on the use of
land created
by contract.

As stated above, it is doubtful whether in any case where the relation of landlord and tenant does not exist the burden of a covenant entered into by the owner of land will run with the land at law. However this may be, there is no doubt that many covenants, of which the burden does not run with the land at law, are enforceable in equity against successive owners of the land taking it with notice of the covenant. To such covenants the objection of perpetuity cannot be raised. The leading case establishing the liability of the land to such covenants in equity is *Tulk v. Moxhay* (*h*).

Doctrine of
Tulk v.
Moxhay.

There is considerable difficulty in determining what covenants are and what are not within the doctrine of *Tulk v. Moxhay*. In *Haywood v. Brunswick, &c., Building Society*, above mentioned, affirmative covenants, and covenants requiring the expenditure of money by the

(*b*) See Woodfall's Land. and Tenant, 12th ed., 640; and *supra*, p. 13.

(*c*) See *Thomas v. Hayward*, L. R. 4 Ex. 311; 38 L. J. Ex. 175.

(*d*) See *Doe d. Calvert v. Reid*, 10 B. & C. 849, where the covenant was to deal with the lessor or his successors in trade.

(*e*) *Fielden v. Slater*, L. R. 7 Ex. 523; 38 L. J. Ch. 379; *Clements v.*

Welles, L. R. 1 Eq. 200; 35 L. J. Ch. 265; *Patman v. Harland*, 17 Ch. D. 353; 50 L. J. Ch. 642; *Nicoll v. Fleming*, 19 Ch. D. 258; 51 L. J. Ch. 166.

(*f*) *Aspden v. Seddon*, 1 Ex. D. 496; 46 L. J. Ex. 353; *Martyn v. Williams*, 1 H. & N. 817; 26 L. J. Ex. 117.

(*g*) *Spencer's case*, 3 Coke, 29.

(*h*) 2 Ph. 774; 18 L. J. Ch. 83.

covenantor were said not to be within *Tulk v. Moxhay*. In some previous cases *Tulk v. Moxhay* was treated as applying to covenants of this character (*i*). In a recent (Scotch) case before the House of Lords (*k*), Lord Selborne, C., alluding apparently to the doctrine of *Tulk v. Moxhay*, drew a distinction between covenants imposing merely a personal obligation on the owner of the land (the covenantor) and covenants relating to the use of the land. The former, he thought, cannot, while the latter may, be enforceable against successive owners of the land. This distinction has not been recognised in all the cases. In *Catt v. Tourle* (*l*), a covenant by a grantee in fee that all the beer to be consumed on the land should be supplied by the vendor, was enforced against an assign of the covenantor. *Luker v. Dennis* (*m*) is a still stronger case. A similar brewers' covenant was there enforced against an assign of the covenantor; the covenant not having been entered into upon a purchase or lease of the house in respect of which the covenant was enforced, but upon a lease of other premises granted to the covenantor by the covenantee. These cases were decided upon the ground that the covenant related to the use and employment of the land. In *Wilson v. Hart* (*n*) a covenant by the grantee in fee (assigns not being named) that no public house should be built on the land was said by Turner, L.J., to be "a covenant directed not against the use of the land, but against the personal use and enjoyment of the building to be erected on the land . . . applying merely to the personal use and enjoyment of the land by the grantee, and not to the permanent user of the land itself." It was nevertheless enforced against an assign of the original grantee, who took with notice, under the doctrine of *Tulk v. Moxhay*.

(i) See *infra*, p. 18.

(k) *Earl of Zetland v. Hislop*, 7 Ap. Ca. 427, 447.

(l) L. R. 4 Ch. 654; 38 L. J. Ch. 401, 665.

(m) 7 Ch. D. 227; 47 L. J. Ch. 174.

(n) L. R. 1 Ch. 463; 35 L. J. Ch. 569; and see *Nicoll v. Fleming*, 19 Ch. D. 258; 51 L. J. Ch. 166.

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Lord Selborne, in the case above mentioned (*o*), throws some doubt on *Catt v. Tourle*, on the ground apparently that the covenant did not relate to the use of the land and was merely personal. The decision of Lord Brougham in *Keppell v. Bailey* (*p*), with reference to a similar covenant to deal exclusively, Lord Selborne appears to prefer to that of the Lords Justices in *Catt v. Tourle*. A restriction in a feu charter against carrying on the trade of a publican (*q*) he considered valid, and capable of running with the land (*r*); but in *Wilson v. Hart* (*s*), Turner, L.J., though enforcing a covenant against using a house as a beer-shop against an assign of the covenantor taking with notice of the covenant, said that the covenant would not run with the land at law. In *Thomas v. Hayward* (*t*), the benefit of a covenant by a lessor not to build a public house within a certain distance of the demised premises was held not to run with the term, on the ground that it concerned not the demised premises, but only the value of the trade to be carried on there.

In *Cooke v. Chilcott* (*u*), Malins, V.-C., enforced a covenant by a purchaser to erect a pump and supply with water houses to be built on the vendor's adjoining land against an assign of the purchaser taking with notice. This case was dissented from in *Haywood v. Brunswick, &c., Building Society*, and *London and South Western Railway Co. v. Gomm*. In *Morland v. Cook* (*x*), *Daniel v. Stepney* (*y*), and *Aspden v. Seddon* (*z*), are dicta or decisions to the effect that affirmative covenants, and covenants requiring money to be paid, are enforceable

(*o*) *Earl of Zetland v. Hislop*, 7 Ap. Ca. 427.

(*p*) 2 M. & K. 517.

(*q*) Like the covenant in *Wilson v. Hart*, L. R. 1 Ch. 643.

(*r*) *Earl of Zetland v. Hislop*, *ubi supra*.

(*s*) L. R. 1 Ch. 643; but see per Knight Bruce, L.J., *ibid*.

(*t*) L. R. 4 Ex. 311; 38 L. J. Ex.

175.

(*u*) 3 Ch. D. 694; 34 L. T. N. S. 207.

(*x*) L. R. 6 Eq. 252; 37 L. J. Ch. 825.

(*y*) L. R. 9 Ex. 185; 41 L. J. Ex. 208.

(*z*) L. R. 1 Ex. 496; 46 L. J. Ex. 353.

under the doctrine of *Tulk v. Moxhay*; but, so far as these cases are inconsistent with the later cases above mentioned before the Court of Appeal, they must be considered to be overruled.

The power, created by the Conveyancing and Law of Property Act, 1881 (a), of enlarging a long term of years into the fee simple seems to afford a means of annexing to the legal fee the burden of covenants, which, previous to that Act, could run with the land only in equity and with notice. For by section 65, sub-s. 4, it is provided that "The estate in fee simple so acquired by enlargement shall be subject to all the same trusts, powers, executory limitations over rights, and equities, and to all the same covenants and provisions relating to user and enjoyment, and to all the same obligations of every kind as the term would have been subject to if it had not been so enlarged."

A covenant by an owner in fee that the covenantee, his heirs and assigns, shall have a right of pre-emption of the land is not merely personal; nor, on the other hand, does the burden of it run with the land, either at law or in equity (b). It is not within the doctrine of *Tulk v. Moxhay*, so as to be enforceable by the covenantee or his assigns against an assign of the covenantor (c). Apart from the question of perpetuity, it seems, therefore, that at all events beyond the life of the covenantor, it does not bind the land, even in the hands of an assign with notice. In *London and South Western Railway Co. v. Gomm*, it was held that, assuming the covenant to be enforceable against an assign of the covenantor, it was void for remoteness, as creating an interest in land which did not vest within the legal period. In that case it was not necessary to decide whether the covenant was void as against the

Contract by an owner in fee to give a right of pre-emption.

(a) 44 & 45 Vict. c. 41, s. 65.

(b) *London and South Western Railway Co. v. Gomm*, 20 Ch. D. 562; 51 L. J. Ch. 193, 530; *Collison v. Lettsom*, 6 Taunt. 224, as to

which case see Sugd. V. & P., 13th ed., 485.

(c) *London and South Western Railway Co. v. Gomm*, *ubi supra*.

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covenantor. It may be doubted whether it is not enforceable against him (*d*).

A contract for the sale of land runs with the land in equity as against a person taking the land with notice. "Where a contract is made for the sale of an estate, equity considers the vendor as a trustee for the purchaser (*e*)"; and an alienee of the land contracted to be sold is liable to an action for specific performance at the suit of the purchaser (*f*). Such a contract creates, immediately upon its execution, an equitable interest in the land in favour of the purchaser. So the equitable interest arising under a covenant in a lease for renewal vests upon the execution of the covenant, and not when the time for renewal arrives (*g*). But in the case of a contract to give a right of pre-emption the equitable interest in the land arises, not upon the execution of the contract, but upon the exercise of the right of pre-emption (*h*).

Easements, an exception to the Rule against Perpetuities.

Easements are a well-established exception to the Rule against Perpetuities (*i*). As pointed out above, they resemble in many respects rights arising under covenants which run with the land.

Property may, notwithstanding the Rule, be inalienable through a succession of minorities.

The operation of the Rule against Perpetuities is not theoretically perfect. On the one hand it invalidates limitations in some cases where the property is never inalienable (*k*); on the other, it may happen, notwithstanding the Rule, that property is inalienable for centuries. This may be the case where land is in settlement, and the tenants in tail die in succession under age.

(*d*) See *Stocker v. Dean*, 16 Beav. 161; see also 1 Dart's V. & P., 5th ed., 209.

(*e*) Sugd. V. & P., 14th ed., 175.

(*f*) Fry, Specific Performance, 2nd ed., 94.

(*g*) *Moore v. Clench*, 1 Ch. D. 447, 452; 45 L. J. Ch. 80.

(*h*) *London and South Western Railway Co. v. Gomm*, 20 Ch. D. 562; and see *Edwards v. West*, 7

Ch. D. 858; 47 L. J. Ch. 463; *In re Cant's Estate*, 4 De G. & J. 503; 28 L. J. Ch. 641; *Radnor, Earl of, v. Shafto*, 11 Ves. 448, as to the nature of such an interest.

(*i*) Per Jessel, M.R., *London and South Western Railway Co. v. Gomm*, 20 Ch. D. 562, 583; 51 L. J. Ch. 530.

(*k*) See *infra*, p. 51.

To such a state of things the Rule against Perpetuities has no application. The property is inalienable, not because of any vice or illegality in the limitation, but by reason of the accidental disability of the heirs in tail. "The law, which admits of a strict settlement, admits that the corpus of the estate may be inalienable for centuries, by reason of disabilities which the law itself imposes" (l). So Wood, V.-C., in *Turvin v. Newcombe* (m): "When the limitations themselves are valid, the possibility that accumulations may result from such legal limitation by reason of infancies and the like, which may prevent for an indefinite time the estate tail from being barred, is not a reason for holding that the limitations themselves are void." In a recent case (n), Kay, J., appears to have considered that the possibility of the property becoming inalienable for a long period by reason of the possible infancy or disability of the person entitled under an executory limitation was a reason for holding the executory limitation to be void for remoteness. But it seems doubtful whether a limitation could be held void for remoteness on that ground alone.

The Rule against Perpetuities has not prevented the creation, from time to time, by the Legislature of Statutory Perpetuities for special objects connected with the public good.

Lands and other property have been granted to individuals by the nation, as a reward for public services, and settled by statute inalienably upon their families (o); the

(l) Per Wigram, V.-C., in *Ferrand v. Wilson*, 4 Ha. 344, 374; 9 Jur. O. S. 86; 2 M. & K. 527.

(m) 3 K. & J. 16, 19; 3 Jur. N. S. 203.

(n) *London and South Western Railway Co. v. Gomm*, 20 Ch. D. 562, 573; 51 L. J. Ch. 193.

(o) Blenheim is so settled on the family of the Duke of Marlborough by 3 & 4 Anne, c. 6; 5 Anne, c. 3; and 5 Anne, c. 4; and Strathfield-saye on that of the Duke of Wel-

lington by 54 Geo. III., c. 161. For other instances see *Mountjoy's case*, Pt. 5 Co. Rep. 3, b, the Manor of Hemston Arundel; 41 Geo. III. c. 59; 2 & 3 Ph. & M. c. 23 (Private). As to property so settled, it seems that a good title cannot be acquired against the issue in tail of the original grantee under the Statutes of Limitation; see *Earl of Abergavenny v. Brace*, L. R. 7 Ex. 145; 41 L. J. Ex. 121.

Chap. I. Earldom of Arundel and the possession of Arundel Castle are inseparably connected by a private Act of Parliament (*p*); hereditary Crown lands are, with certain exceptions created by subsequent Acts, inalienable by 1 Anne, c. 1; Corporations and unincorporated Societies for trading and other purposes are erected, with power to hold land and other property in perpetuity (*q*); and such property is frequently inalienable, as in the case of the land of a Railway Company where there is no statutory power to sell (*r*), and the property of Literary and Scientific Institutions (*s*). So by the Burials Acts an exclusive right of burial in perpetuity may be granted by a Burial Board (*t*).

Property of Corporations

Lands of Railway Company.
Right of burial in perpetuity.

Property of municipal corporation.

Property held by municipal corporations, and to the enjoyment of which the freemen of the borough are entitled by virtue of 5 & 6 Will. IV. c. 76, s. 2, is held in perpetuity for the benefit of the freemen, and not upon a charitable trust. The Rule against Perpetuities is inapplicable to property so held; it is excluded by the statute, which enacts that property so held and applied at the passing of the Act shall continue to be so applied in the future (*u*).

A curious instance of inalienable property occurred in the recent case of *Goodman v. Mayor of Saltash* (*x*). It was there held that the Corporation of Saltash was entitled, under an actual or presumed grant from the

(*p*) By 3 Car. I. c. IV.; see *The Berkeley Peerage Case*, 8 H. L. C. 21; 101, 137.

(*q*) As to the power of the Crown to grant licences in mortmain, see 7 & 8 Will. III. c. 37. As to the power of companies to hold land, see 25 & 26 Vict. c. 89, ss. 18, 21. See also Shelford on Mortmain, 34, seq.; Grant on Corporations, 98, seq.

(*r*) See *The Queen v. South Wales Railway Co.*, 14 Q. B. 902; 26 & 27 Vict. c. 92, s. 10; *Mullin v. Midland*

Railway Co., 11 Ch. D. 611; 48 L. J. Ch. 258.

(*s*) See 17 & 18 Vict. c. 112, s. 30.

(*t*) 15 & 16 Vict. c. 85, 16 & 17 Vict. c. 134. As to the character of such property, see *Matthews v. Jeffrey*, 6 Q. B. D. 290; 50 L. J. Ch. 164.

(*u*) See per Hall, V.-C., *Prestney v. Mayor and Corporation of Colchester and The Attorney-General*, 21 Ch. D. 111, 119; 51 L. J. Ch. 805.

(*x*) 7 Ap. Ca. 633.

Crown, to a several oyster fishery in the river Tamar, subject to a right in the inhabitants, or a particular class of the inhabitants, of the borough to fish during part of the year. Notwithstanding the inalienable character of such a right in a fluctuating and unincorporated body of persons, it was held by the House of Lords (Lords Selborne, Cairns, Bramwell, Watson, and Fitzgerald, *dis-sentiente* Lord Blackburn) that it could be well created by grant, and existed in the case before them, either as an exception from the original grant to the corporation, or as a charitable trust. Lord Blackburn was of opinion that "no form of grant, either ancient or modern, could be framed effectually giving to a fluctuating body a right in fee to a profit *à prendre* in land, either by a grant to that body direct, or by casting upon the grantee in fee of a several fishery, or of any other real property, an obligation to permit a fluctuating or uncertain body to take such a profit *à prendre* out of the subject of the grant" (y).

The right of a railway company to the possession and control in perpetuity of the lands and works of another railway company under a working agreement has been called a perpetuity (z). The interest of the one company in the property of the other is the creation of Statute; it is an interest unknown to the common law, and could not be created by contract between individuals (z).

An estate tail in lands granted to a subject for services by or at the provision of the Crown, and whereof the remainder or reversion is in the Crown, cannot be barred (a). But there is ground for the opinion that, by virtue of 3 & 4 Will. IV. c. 74, a tenant in tail of lands, not granted for services, can now bar a remainder or reversion in the Crown, which previously to that Act was protected by the common law prerogative of the Crown (b).

(y) 7 Ap. Ca. p. 655.

(z) *Sevenoaks, Maidstone and Tunbridge Railway Co. v. London, Chatham and Dover Railway Co.*, 11 Ch. D. 625;

see *ib.*, p. 635; 48 L. J. Ch. 513.

(a) 34 & 35 Hen. VIII. c. 20; 3 & 4 Will. IV. c. 74, s. 18.

(b) See Lewis on Perp. 714.

Right of one railway company to the possession of the lands of another company under a working agreement.

Estate tail with reversion in the Crown.

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The Statute of Henry VIII. does not apply to lands conveyed to the Crown for the purpose of being reconveyed to a subject in tail, with a reservation of the reversion in fee to the Crown, and so indirectly creating an unbarrable estate tail (*c*).

Charitable trusts.

Property held upon charitable trusts is excepted from the operation of the Rule against Perpetuities on grounds of public policy. This subject is fully discussed below (*d*).

Religious endowments.

Upon grounds similar to those upon which property devoted to charitable purposes is allowed to be withdrawn permanently from circulation, the great mass of Church of England and other religious endowments is altogether outside the Rule against Perpetuities. But religious purposes are exempt from the Rule so far only as they are intended to benefit the public, and not merely individuals (*e*). The subject of religious and other charitable trusts is considered separately below (*f*).

Limitation of a short term of years upon a remote event.

It does not appear to have been decided whether a limitation of property which cannot endure beyond lives in being and twenty-one years after can be void for remoteness; whether, for example, a limitation of leaseholds having twenty years to run to the first son of A., a bachelor, who attains twenty-two, is too remote; as clearly would be the case, if the subject of limitation were money or the fee simple of real estate. It would seem that in the limitation supposed the proviso must be implied—"in case such son of A. shall attain twenty-two within twenty years from the date of the limitation." If there were a proviso to this effect expressed, there is no doubt that the limitation would be free from objection. The result would seem to be the same where the proviso is necessarily implied. The question, however, cannot be considered to be free from doubt; having regard to the fact that in other

(*c*) *Johnson d. Earl of Anglesea v. Earl of Derby*, 2 Show. 104; 11 Mod. 304.

(*d*) *Infra*, p. 295, *seq.*

(*e*) See *Cocks v. Manners*, L. R. 16 Eq. 574; *West v. Shuttleworth*, 2 M. & K. 684.

(*f*) p. 295.

cases the matter has been treated as one of expression rather than of intention (*g*). Chap. I.

In *Kemp v. South Eastern Railway Co. (h)*, there was an agreement between a railway company and a landowner that the company should be at liberty (so far as appeared from the agreement, at any time) to take land required for the railway at a price named. It was held that the option or power to take land being, in fact, limited to the time fixed by law for the completion of the railway, the agreement was to be construed with reference to that fact. No question of remoteness was raised. It would seem that, except for the implied limitation as to the time within which the agreement could operate, it would have been void for perpetuity (*i*).

The Rule against Perpetuities is a branch, not of the law of contract, but of property. "A contract not creating any estate or interest, properly so called, in property, at law or in equity, is not obnoxious to the Rule. For instance, a covenant to pay £1000, when demanded, with interest meanwhile, if not barred by the Statute of Limitations, might be enforced by an action of covenant at any time" (*k*). So the benefit of covenants for title and other covenants of a like nature may run with the land for ever.

By a deed, executed in 1770, the East India Company covenanted with Lord Clive that, in case they should cease to employ a military force, they would pay to him, his executors, administrators or assigns, a sum of money corresponding with a sum then handed to the Company by Lord Clive to be applied by them in the relief of soldiers' widows. In 1858, when the Company came to an end, the

(*g*) See per Jessel, M.R., in *Miles v. Harford*, 12 Ch. D. 691, 702; 41 L. T. N. S. 378.

(*h*) L. R. 7 Ch. 364; 41 L. J. Ch. 50, 404.

(*i*) See *London and South Western*

Railway Co. v. Gomm, *supra*, p. 9.

(*k*) Per Kay J., *London and South Western Railway Co. v. Gomm*, 20 Ch. D. 562, 575; and see per Jessel, M.R., *ibid.*, p. 580.

The Rule against Perpetuities does not apply to personal contracts.

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representatives of Lord Clive claimed the sum under the covenant. It was contended that the covenant was void for remoteness; but it was held that the covenant was valid and that the money was payable (*l*).

Limitation of
rents or in-
come for ever.

A gift of the rents of real estate, or the income of personalty, to a person for ever, is an immediate gift of the fee simple in the lands (*m*), or of the absolute interest in the personalty (*n*), as the case may be. A trust to pay the rents or income operates in the same way (*o*). Notwithstanding the apparently indefinite duration of the limitation or trust, the Rule against Perpetuities obviously has no application.

So remoteness will not be imported into a limitation by words which are merely descriptive of the duration of the estate, for years or in tail, that is limited (*p*).

In *Goodman v. Mayor, &c., of Saltash* (*q*) it was held by Lord Bramwell, that an exclusive right of fishery in an arm of the sea could be created by grant from the Crown, with an exception in favour of certain persons—in the case before him a certain class of inhabitants of a borough. “And as to the argument that a perpetuity which cannot be released is created, the answer is, that the perpetuity is only that which all the Queen’s subjects have, namely, to fish in an arm of the sea” (*r*).

But the attempt to impress personalty with the character of real estate, so that successive generations of the issue in tail of the first taker may enjoy the income for ever, will, of course, fail. In *Raphael v. Boehm* (*s*) the testator directed that the income of a certain fund should be

(*l*) *Walsh v. Secretary of State for India*, 10 H. L. C. 367; 8 Jur. N. S. 26.

(*m*) *Doe d. Goldin v. Lakeman*, 2 B. & Ad. 30.

(*n*) *Elton v. Sheppard*, 1 Bro. C. C. 532; *Blann v. Bell*, 2 D. M. & G. 775; 22 L. J. Ch. 236; *Adamson v. Armitage*, 19 Ves. 415, 418.

(*o*) *Haig v. Swiney*, 1 S. & S. 487; *Page v. Leapingwell*, 18 Ves. 463; *Commissioners of Charitable Donations v. De Clifford*, 1 Dr. & War. 245.

(*p*) See *infra*, p. 69.

(*q*) 7 Ap. Ca. 633.

(*r*) *Ibid.* p. 667.

(*s*) 22 L. J. Ch. 299.

received by his three sons, A., B., and C., successively for life; and after the death of the survivor of them, by the first and other sons of A. and their issue in succession for life; and in default of issue of A., the interest was to be received by the first and other sons of B. and their issue in succession for life; with a similar direction in favour of the issue of C., in default of issue of B. It was held that, after the gift to the sons for life, all the gifts to issue were void for remoteness.

The question whether a given limitation complies with the Rule against Perpetuities can sometimes be answered from the words of the limitation without regard to the circumstances of the particular case. Thus, a limitation to the first unborn son of A. who attains twenty-five can, under no circumstances, be valid. But frequently the question of remoteness depends upon the circumstances to which the limitation has to be applied. Thus, a limitation by will to the first son of A. who attains twenty-five is valid, if a son of A. has attained twenty-five and is living at the testator's death; otherwise it is void for remoteness.

Facts by which the question of remoteness is tried.

Where the limitation is by deed, no difficulty arises as to what circumstances are to be taken into consideration; clearly they are the circumstances which exist at the date of the execution of the deed.

Where the limitation is by deed.

In the case of a limitation in exercise of a power, events occurring after the creation of the power, and before its execution, are material. This follows from the rule that a power which includes objects who are too remote is not void altogether, but so far only as it is exercised in favour of those objects who are too remote (*t*).

Where it is in exercise of a power.

A trust to convey lands at a future time to uses to be then ascertained will, it seems, be valid as regards uses which would not have been too remote, if limited by the instrument creating the trust (*u*). Thus, events occurring

Or executory trust.

(*t*) See *infra*, p. 236.

Dow. 194; *infra*, p. 138.

(*u*) *Tregonwell v. Sydenham*, 3

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Where the
limitation is
by will.

after the creation of the trust, and before its execution, are material upon the question of remoteness.

In the case of a limitation by will, the question has arisen, whether events occurring after the date of the will, and before the testator's death, affect the question of remoteness. The authorities upon the point are not quite clear. In *Mackinnon v. Peach* (x) there was a gift of chattels to the testator's two daughters, with a gift over, upon the death of either without issue, of her share to the other daughter. One daughter died in the testator's life. It was held that the gift over took effect. It is not clear, however, that an indefinite failure of issue was intended. If failure at death was intended, the gift over was valid in any event.

In *Williams v. Teale* (y), Vice-Chancellor Wigram said : " If a testator should give his property to A. for life, with remainder to such of A.'s children as should attain twenty-five years of age, and the testator should die, living A., there is no doubt that the limitations over to the children of A. would be void (z) (*Leake v. Robinson* (a)). But if, in that case, A. had died, living the testator, and, at the death of the testator all the children of A. had attained twenty-five, the class would be then ascertained; and I cannot think it possible that any court of justice would exclude them from the benefit of the bequest on the ground only that if A. had survived the testator the bequest would have been void, because the class, in that case, could not have been ascertained."

In *Pearl v. Kekewich* (b) there was a devise in trust for A. for life, with remainder to his children as he should appoint. At the testator's death (though not at the date of the will) A. had a son, B., of the age (at the testator's

(x) 2 Keen, 155.

(y) 6 Hare, 239, 251.

(z) This is not true of a legal devise of real estate. See *Mogg v. Mogg*, 1 Mer. 654; *Festing v. Allen*,

12 M. & W. 279; 13 L. J. Ex. 74.

(a) 2 Mer. 363.

(b) 15 Beav. 166; 21 L. J. Ch. 456.

death) of three years. A. by will appointed to trustees in trust for B. and his heirs, and to be conveyed to him at twenty-three, with a gift over to other sons if B. died under twenty-one. And he directed the rents to be accumulated *until B., or such other sons*, should attain twenty-three, and then to be paid over to B., or to such other sons as should first attain twenty-three. It was held that, as to B., the trust for accumulation was valid. No opinion was expressed as to its validity in the case of the other sons, but it would seem to be clearly void for remoteness as to any son who was not three years old at the testator's death.

In *Southern v. Wollaston* (c) there was a gift to A. for life, with remainder to such of his children as should attain twenty-five, as tenants in common. A. having died in the testator's lifetime, it was held that the gift to the children, which would otherwise have been too remote, was good.

Again, in applying the *cy près* rule to a limitation to A. for life, with remainders to A.'s children successively for their lives, A. is held to take an estate for life, or in tail, according as he is in existence or unborn at the testator's death (d).

In *Picken v. Matthews* (e) the testator gave real and personal property upon trust for such of the children of his two daughters as should attain twenty-five. One grandchild had attained twenty-five, and both the daughters were living at the testator's death. It was held by Malins, V.-C., that the gift, which otherwise would have been void for remoteness, was good, because, one grandchild having attained twenty-five, the class was ascertained at the testator's death.

In *Hodgson v. Halford* (f) there was an appointment

(c) 16 Beav. 166; 22 L. J. Ch. 664. 150.

(d) *Infra*, p. 268.

(e) 10 Ch. D. 264; 48 L. J. Ch. 548.

(f) 11 Ch. D. 959; 48 L. J. Ch.

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by will in exercise of a power to the appointor's children, who were born after the creation of the power, with a forfeiture clause in the event of their marrying Christians. The forfeiture clause was held void for remoteness in the case of a child marrying after the appointor's death, but valid as to a child who married in his lifetime.

From these and similar cases (*g*) it appears that the events to be looked at are those existing at the testator's death. On the other hand, there is some authority for the opinion that events occurring between the date of the will and the testator's death cannot make valid a limitation, which would have been void for remoteness, if the testator had died immediately after the date of the will.

In *Harris v. Davis* (*h*) leaseholds were given over, in effect, upon the death of a prior legatee without heirs of the body. It was held by Knight Bruce, V.-C., that the gift over was void for remoteness; and that, notwithstanding the death without issue of the prior legatee in the testator's lifetime. In *Gower v. Grosvenor* (*i*) there is a dictum of Lord Hardwicke to the same effect as the decision in *Harris v. Davis*.

The recent Act, 1 Vict. c. 26, s. 24, as to the time from which wills taking effect after the 1st of January, 1838, shall speak, does not affect the question under consideration. That enactment refers only to the ascertainment of the property disposed of by the will (*k*).

The better opinion seems to be, in accordance with the decision in *Picken v. Matthews* and the dictum of Wigram,

(*g*) See *Wilson v. Wilson*, 28 L. J. Ch. 95; 4 Jur. N. S. 1076; *Herbert v. Webster*, 15 Ch. D. 610; 49 L. J. Ch. 620; *Dungannon v. Smith*, 12 Cl. & Fin. 574; *Cattlin v. Brown*, 11 Ha. 372, 382; 1 W. R. 533; *Wilkinson v. Duncan*, 30 B. 111; 26 L. J. Ch. 495; and see per Lord St. Leonards in *Monypenny v. Dering*, 2 D. M. & G. 145, 170: "If issue of P. M. had been born in the lifetime of the testator, the de-

vise" (to the first son of such issue as purchaser) "would have been valid." See also *Morgan v. Gronow*, L. R. 16 Eq. 1; 42 L. J. Ch. 410; *Pearks v. Mosley*, 5 Ap. Ca. 714, 722; 50 L. J. Ch. 57.

(*h*) 1 Colt. 416; 9 Jur. O. S. 269. (*i*) 5 Mad. 337.

(*k*) See per Turner, L.J., in *Lady Langdale v. Briggs*, 2 Jur. N. S. 982; 8 D. M. & G. 391, 436.

V.-C., in *William v. Teale*, that the state of circumstances by which the question of remoteness is to be tried is that existing at the testator's death, and not that existing at the date of the will.

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While on the one hand a limitation which, *prima facie*, is too remote may be valid, as applied to certain persons and certain property, it will be seen hereafter that parol evidence is not admissible, merely to show that a limitation cannot, in fact, take effect except within the period allowed by law. Thus, if the validity of a limitation depends upon a living person having no more children, the fact that the person is a woman past childbearing is immaterial (*l*).

Parol evidence not admissible to avoid remoteness.

A limitation takes effect within the meaning of the Rule when, by virtue of it, the property vests (*m*) in an ascertained object. The vesting required is vesting in interest as distinguished from vesting in possession. The Rule has sometimes been spoken of as requiring property to vest in possession within a given time (*n*). This is clearly incorrect. In the case of limitations where the time of vesting in possession is different from the time of vesting in interest, the latter is alone to be regarded. "The mischief against which the law as to remoteness is directed is this—that the property is rendered inalienable by the suspension of the vesting; but if the interest be vested this mischief does not exist" (*o*).

A limitation "takes effect" when it vests in interest.

Where there is a limitation to A. for life, remainder to his unborn son for life, remainder to B. a living person, the property is not more alienable than in the case of a limitation to A., and, upon failure at any time of his issue, to B. The interest of B. in both cases is alienable immediately, both at law and in equity. The evil against which the

(*l*) See *infra*, p. 68.

(*m*) As to the meaning of "vesting," see *infra*, p. 39, *seq.*

(*n*) See *Liley v. Hey*, 11 Ha. 580; 11 L. J. Ch. 415. The dictum of Westbury, C., in *Wetherell v. Wetherell*, 1 D. J. & S. 134, 139; 22 L. J. Ch. 476, to the effect that the class

must "come into the enjoyment of the property" within the legal period, is with reference to a case in which the enjoyment was simultaneous with the vesting in interest.

(*o*) Per Turner, L.J., *Oddie v. Brown*, 4 De G. & J. 179, 196; 28 L. J. Ch. 542, 547.

Chap. I. Rule against Perpetuities was provided—the suspense of the power of alienation—does not seem to exist in either case. Yet, while in the former case the limitation is valid, in the latter it is void for remoteness. It is difficult to reconcile this state of the law with principle. The result is anomalous, but the law is well settled. The subject will be further considered in a subsequent chapter (*p*).

The period allowed by the Rule against Perpetuities. The time within which a limitation must take effect is a life or lives in being at the execution of the deed or the death of the testator, as the case may be, and twenty-one years after the termination of the life or the last of the lives. The lives may be taken arbitrarily, and are not restricted to those of persons taking interests under the instrument; and there is no limit to their number (*q*). In *Cadell v. Palmer* (*r*) twenty-eight lives were taken; some by name, others by a class description; some taking interests under the instrument, and others not.

What lives may be taken. This case, which finally settled the law as to the period during which property may be tied up, was decided by the House of Lords (*s*) in 1833. The testator devised real estates to trustees upon trust to accumulate the rents for twenty-one years and invest the accumulations in the purchase of lands to be settled and held upon the trusts declared concerning the estates devised by the will. These trusts were as follows: During the term of 120 years from the testator's death, if A., B., C., and twenty-five other living persons named or described (of whom some took under the will and others did not) or any of them should so long live, and for a further term of twenty years from the expiration or sooner determination of the 120 years' term, in trust for A. for ninety-nine years, if he should so long live, and the 120 and twenty years' terms or either of them should so long last; and from the expiration or sooner determination of

(*p*) *Infra*, p. 51.
 (*q*) *Cadell v. Palmer*, 1 Cl. & F. 372; *Thelluson v. Woodford*, 4 Ves. 227.

(*r*) 1 Cl. & F. 372.
 (*s*) 1 Cl. & F. 372; in the Court below *nom. Bengough v. Edridge*, 1 Sim. 273.

the ninety-nine years' term, in trust for the first and other sons of A. successively ; and after the determination of the estate and interest of each such son, in trust for the heir male of his body for the time being, and from time to time, or other the person who (his parent being dead) would be heir male of the body of such son under an estate tail limited to such son and the heirs male of his body ; to hold to such son or person for the term of ninety-nine years, if he should so long live, and the 120 and twenty years' terms or either of them should so long last. Similar trusts were then declared of the 120 and twenty years' terms in favour of B., C., and others of the twenty-eight persons above-mentioned, and their respective issue in succession ; and finally in favour of the testator's right heirs for the time being and in succession, for ninety-nine years determinable on death in each case. The testator then directed that upon the expiration or sooner determination of the 120 and twenty years' terms the estates should be conveyed to such person or persons as would then be entitled to the same either by descent or purchase if the same had by his will been settled upon A. for life, with remainder to his first and other sons successively in tail male, with similar remainders to B., C., and the other persons named and their respective issue for life and in tail in succession, with reversion to the testator's right heirs. And he declared that the person to whom such conveyance should be made should have such estate as he would have taken if the limitations had been contained in the will, but so that his estates should be contingent, and not vested, until the expiration of the terms of 120 and twenty years ; and any such person entitled to the rents during the said terms was to be entitled to call for a conveyance to him of the estates for his life. The trusts of the will were declared valid and were ordered to be carried into effect. It was strongly contended that the whole machinery of the will was a fraud on the Rule against Perpetuities ; but the

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decision of the House of Lords shows that it was a skilful and successful device to tie up the property for the utmost period allowed by the law.

If no lives are taken, the period of twenty-one years must not be exceeded. Thus limitations to take effect at the end of twenty-eight, thirty, and fifty years from the instrument coming into operation have been held void for remoteness (*t*).

A gift to such of a number of persons in being at the testator's death as shall be living thirty years after his death is good, since it must take effect, if at all, within a life in being (*u*). But if the persons to take are not ascertainable until that time, the gift would be too remote (*x*).

When the
period allowed
by the Rule
begins to run.

The period allowed by the Rule is to be reckoned from the time when the instrument containing the limitation comes into operation; that is to say, in the case of a deed, from its execution; and, in the case of a will, from the testator's death. If the limitation is in exercise of a power, the time runs from the coming into operation of the instrument creating the power (*y*).

If the effect of a limitation is, by possibility, to suspend the vesting of the property beyond the legal period, it is immaterial when that period occurs—whether it begins to run immediately upon the instrument which contains the limitation taking effect, or subsequently. Thus a limitation of a reversion expectant upon an estate in special tail, to take effect upon the failure of issue (generally) of A., tenant in special tail, is too remote (*z*); and not the less so because, during the A.'s life, it may be defeated by a disentailing deed.

As to the
twenty-one
years.

The period of twenty-one years, which originally had reference to the infancy of parties taking under the instru-

(*t*) *Crooke v. De Vaudes*, 9 Ves. 197; *Palmer v. Holford*, 4 Russ. 403; *Speakman v. Speakman*, 8 Ha. 180.

(*u*) *Lachlan v. Reynolds*, 9 Ha. 796; 22 L. T. O. S. 211.

(*x*) *Speakman v. Speakman*, *supra*.

(*y*) See *infra*, p. 250.

(*z*) *Banks v. Holme*, 1 Russ. 394; and see *infra*, p. 144; *Jack v. Fetherston*, 2 Huds. & Br. 320; 3 Cl. & F. 67.

ment, is now settled to be an absolute term; and the vesting may be suspended for twenty-one years, or for twenty-one years after the expiration of a life or lives in being at the date of the limitation, without regard to infancy (*a*).

A person born within due time after the prescribed period begins to run, or after its termination, is a life in being within the meaning of the Rule (*b*). Hence the period allowed by law for the vesting of interests is sometimes stated to be a life or lives in being and twenty-one years after, together with the usual period of gestation. The addition of the period of gestation, unlike in this respect the term of twenty-one years, can be made only where gestation exists (*c*). Where gestation exists both at the commencement and at the termination of the prescribed period, it seems that twice the period of gestation is allowed (*d*).

A gift by will to an infant, if he attains twenty-five, is valid because it must take effect, if at all, within a life in being. But a gift to the first child of A. who attains twenty-five is void for remoteness (unless a child has attained twenty-five at the testator's death); and not the less so because at the testator's death A. is *enceinte* of a child who afterwards attains twenty-five (*e*). The gift would be void for remoteness even on the assumption that the unborn child was in being at the testator's death, unless he had then attained twenty-five (*f*); for it would be uncertain whether within the legal period he, or any other child of A., would attain twenty-five.

(*a*) *Cadell v. Palmer*, 1 Cl. & F. 372.

(*b*) See 10 & 11 Will. III. c. 16; and as to the common law, *Northey v. Strange*, 1 P. W. 340; *Wallis v. Hodson*, 2 Atk. 114; *Kevern v. Williams*, 5 Sim. 171 (as to *Sophia*).

(*c*) *Cadell v. Palmer*, 1 Cl. & F. 372.

(*d*) See *Gulliver v. Wickett*, 1 Wils. 105; *Long v. Blackall*, 7 T. R. 100; and the opinion of the judges delivered to the House of Lords in *Thellusson v. Woodford*, 11 Ves. 112, 143; 6 Cruise's Dig., 454, 4th ed.

(*e*) *Merlin v. Blaynave*, 25 Beav. 125.

(*f*) See *infra*, p. 68.

NOTE.

The origin and history of the Rule against Perpetuities.

(From Butler's note to Fearn's Contingent Remainders, p. 561.)

"The reception of executory uses into the law of England gave rise to that important part of its jurisprudence which respects the doctrine of perpetuity, or excessive restraint on alienation. No question of perpetuity could arise at the common law or under the statute *De donis*. It has been shown that, after the statute *De donis*, and before the introduction of executory uses, future estates could only be created by way of remainder. The remoteness of a remainder, however great, was no objection to it on its creation. If the event upon which it was to vest took place during the continuance of the preceding estate, or at the instant of its determination, the remainder would vest in possession immediately on the determination of the preceding estate; if the event did not take place during the continuance of the preceding estate, or at the instant of its determination, the remainder would wholly fail of effect; during this period, therefore, of our law, all enquiry respecting perpetuity was out of question.

"The cases of a possibility upon a possibility may be considered as exceptions from the rule. They proceeded on a different ground, and gave rise to the important rule that if land is limited to an unborn person during his life, a remainder cannot be limited so as to confer an estate by purchase on that person's issue.

"After the introduction of executory uses the question of perpetuity necessarily forced itself on the attention of the Courts. The introduction of fines, and, still more, the introduction of recoveries, which originated in an arbitrary decision of the judges, in direct opposition to a positive statute, sufficiently showed that such a modification of property as rendered it perpetually inalienable, or postponed the power of alienating it to a period excessively remote, would not be endured. It was therefore incumbent on the Courts to fix the boundary beyond which

excessive limitations should not be permitted to operate. In fixing it they proceeded by way of analogy to the legal effect of remainders at common law in postponing the exercise of powers of alienation. The usual effect of such a settlement was to limit lands to a person during his life, with an immediate remainder to his children, or some of them, in tail. In all such cases the tenant for life was in existence when the settlement began to operate; and it has been stated that the law did not allow such limitations of it as conferred a life estate on his children with remainders in tail to their children.

“Thus the utmost restraint upon alienation which the law, as it stood after the statute *De donis*, allowed in the settlement of real property was, the limitation of one or more life estates to persons in being, and a limitation of one or more estates tail in remainder expectant on the expiration of the preceding estate or estates for life.

“A power of alienation by fine or recovery was inseparably inherent to the seisin of an estate tail; but the exercise of it was necessarily suspended during the minority of a tenant in tail. Supposing, therefore, an estate to be limited in the usual manner to the father for life, remainder to the sons successively in tail, and that the father died leaving an only son just born, or his wife *enseint*, the land would be inalienable during the life of the tenant for life, and after his decease would remain inalienable during twenty-one years (the term of the son's minority), with a possible protraction of that term for a few months, to allow for the period of gestation. This was the utmost period to which the restraint on alienation could be protracted. In reference to this obvious case, and without perplexing the general law on the subject by a further attempt at analogy, the Courts by a long series of determinations fixed the actual boundary of executory limitation at an event so limited that it must, from its nature, either take effect or become incapable of taking effect within the period of one or more life or lives in being, and a further term of twenty-one years, with an allowance of a few months, or at the immediate expiration of that period.

“But as it was understood that an executory use engrafted on an estate tail was liable to be defeated by the recovery of the

Chap. I. tenant in tail, it was obvious that the danger of perpetuity did not arise in such limitations. Leaving, therefore, at large those executory limitations which were engrafted on estates tail (g), the Courts required that those executory limitations should be confined within the boundary assigned which were engrafted on estates in fee simple permitted to descend or actually limited."

(g) This does not seem to be the case as to executory limitations taking effect after the determination of an estate tail; see *infra*, p. 147.

CHAPTER II.

THE VESTING OF LIMITATIONS.

IN applying the Rule against Perpetuities it is necessary in all cases to determine the point of time at which the limitation in question vests. The word "vest" is used differently of property (a), limitations (b), and interests in property created by limitation (c). Originally it had reference to the feudal possession or seisin of land. A person clothed (*vestitus*) with the seisin, or part of the seisin, was said to have a vested estate. So limitations were said to vest the property in the taker, or to clothe him with an estate in it. In this sense the word is not properly applicable to limitations of real property by way of contingent remainder or executory limitation, to limitations of chattel interests in real property, or to any limitation of which the subject matter is personal property. The term is, nevertheless, applied to all these limitations, but obviously not in the sense above mentioned. They are said to vest, either when they take effect in possession, or, being contingent in their creation, when the contingency is determined.

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"Vest":
meaning of
the word.

It will be convenient to consider when vesting takes place in the case of some of the most usual limitations of real and personal property respectively.

(a) Per *Lyndhurst, C.*, in *Dunannon v. Smith*, 12 Cl. & F. 546, 622.

(b) Per Lord Kenyon, in *Gee v. Audley*, 1 Cox, 324, 325; and see F.

C. R. 438, 10th ed.

(c) Per Leach, M.R., in *Palmer v. Holford*, 4 Russ. 403, 407; and Jessel, M.R., *Selby v. Whittaker*, 6 Ch. D. 239, 247.

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Limitation of
real estate to
A. for a term,
remainder to
B. in fee.

A limitation of real property to A. for a term of years, with remainder to B. in fee, vests as regards the estates of both A. and B. immediately. A. takes a chattel interest presently vested in possession, and B. an estate in fee subject to the term. B.'s estate, though waiting the determination of the term before it vests in possession, is nevertheless presently vested in interest. He has a future, but a vested, interest.

To A. for life
or in tail,
remainder to
B.

By way of
contingent
remainder.

A limitation of real estate by way of remainder expectant upon an estate for life or in tail is either a vested or a contingent remainder. In the former case it vests immediately; in the latter it vests upon the determination of the contingency during the continuance or immediately upon the expiration of the particular estate. Until the event happens upon which the remainder is limited to take effect there is no vesting so as to satisfy the Rule against Perpetuities, although the remainderman is a person ascertained at the date of the limitation. He takes, as soon as the limitation comes into operation, an immediate right to the future enjoyment of the property, subject only to the feudal rule of law requiring a contingent remainder to vest during the continuance or immediately upon the determination of the particular estate; but he does not take a vested estate or interest within the meaning of the Rule against Perpetuities. Thus a limitation to A. for life, remainder to B. in fee, if B. survives A., or if C. survives A., vests upon the death of A. in the life of B. or C. as the case may be.

To A. for
eighty years,
if he so long
live, remain-
der to B.

In the case of a limitation to A. for eighty years if he shall so long live, with remainder on the death of A. to B., the limitation to B. is vested immediately, because the mere possibility that a life in being may endure for eighty years to come does not amount to a degree of uncertainty sufficient to constitute a contingent remainder (*d*). But it is other-

(*d*) F. C. R. 21.

wise if the term is for twenty-one or even sixty years, for then there is such uncertainty (e). Chap. II.

A limitation of real estate to A. for life, and after his death to such of his children as attain twenty-five, takes effect by way of remainder, and vests finally at the death of A. when the class to take is ascertained (f). Children attaining twenty-five after A.'s death being therefore excluded, such a limitation is not void for remoteness. The limitation vests, in a sense, as soon as a son is born to A.; but not absolutely or so as to satisfy the Rule against Perpetuities.

A limitation to A. for life, and after his death to such of his children as, either before or after his death, attain twenty-five, would, it seems, be void for remoteness; since children attaining twenty-five after A.'s death are expressly included, and the gift takes effect as an executory devise. This seems to be the effect of a recent decision of Jessel, M.R. (g); but in a previous case before Hall, V.-C. (h), it was held that the devise took effect as a remainder, and that children attaining the given age after the death of the tenant for life were excluded, though expressly referred to. In this state of the authorities, the law cannot be considered settled.

A limitation by way of shifting or springing use or executory devise vests when the event happens upon which the use arises or the devise takes effect. Although the person to take is in existence and ascertained, there is no vesting until the event happens upon which he becomes entitled to an estate, as distinguished from a right to a future estate, in the land. And not only is there no vesting, but, until the event happens, there is no disposition of the property. "It is an indisputable rule of law that, if a freehold estate be given by way of executory devise, there is no disposition of the property until that estate arises and

To A. for life,
remainder to
his children
who attain
twenty-five.

To A. for life,
and after his
death to such
of his children
as either
before or after
his death
attain twenty-
five.

To A. and his
heirs, and upon
failure at any
time of A.'s
issue, to B.

(e) F.C.R. 24; *Beverley v. Beverley*, 2 Vern. 131.

(f) But see as to this, 1 Jarm. on Wills, 4th ed. 874, 5; *infra*, p. 104.

(g) *Re Lechmere & Lloyd*, 18 Ch. D. 524.

(h) *Brackenbury v. Gibbons*, 2 Ch. D. 417.

Chap. II. becomes vested" (*i*). Thus a devise to A. in fee, with a gift over to B. upon failure at any time of A.'s issue, vests (as to B.) when A.'s issue fails. B. at the date of the limitation takes an immediate right to a future estate, but not an estate or an interest (*k*) which is vested within the meaning of the Rule against Perpetuities.

To A. subject to a power of appointment in B. Real or personal property limited to such uses or to such persons as A. shall appoint, and subject thereto, or until or in default of appointment, to B., is presently vested in B. It is vested, subject to be divested by the exercise of the power (*l*).

Devise after payment of testator's debts. A devise of real estate after payment thereof of the testator's debts is vested. It is construed as a devise subject to a charge of debts, and not contingent upon their payment (*m*). The devisee takes immediately, subject to a chattel interest in the executor or trustee for payment of debts (*m*).

To A. for life, remainder to B. "if he survives" A., or "from and after" A.'s death. A limitation of real or personal property to A. for life remainder to B. "*if he shall survive*" A. (*n*), or to A. for life and "*from and after*" his death to B. (*o*), is vested immediately. The words in italics are descriptive of the event on which the limitation takes effect in possession, and do not import contingency or futurity.

Inaccurate use of the word "vest." The word "vest" or "vested" is often used inaccurately in the sense of "transmissible" (*p*), "indefeasibly

(*i*) Per Westbury, C., *Bective v. Hodgson*, 10 H. L. C. 656, 664.

(*k*) See Butler's note, F. C. R., p. 1.

(*l*) F. C. R. 226, *seq.*; Sugd. Pow. 8th ed. 453, 4.

(*m*) *Carter v. Barnadiston*, 1 P. W. 505; 3 B. P. C. 64; *Bagshaw v. Spencer*, 1 Ves. sen. 142; 2 Atk. 570.

(*n*) *Maddison v. Chapman*, 4 K. & J. 709; 3 De G. & J. 536; 28

L. J. Ch. 450; *Edgeworth v. E.*, L. R. 4 H. L. 35; 17 W. R. 714; *Leadbeater v. Cross*, 2 Q. B. D. 18; 46 L. J. Q. B. 31.

(*o*) *Hallifax v. Wilson*, 16 Ves. 168; *Leeming v. Sherratt*, 2 Ha. 14; 11 L. J. Ch. 423.

(*p*) *Barnes v. Allen*, 1 Bro. C. C. 181. In *In re Orlebar's Tr.*, L. R. 20 Eq. 711, it is used by the Court in this sense; see also 5 De G. & Sm. 198.

vested" (q), "vested in possession," or "become payable" (r). Chap. II.

A limitation subject to a condition precedent vests when the condition is performed. If the condition is such that it will not necessarily be performed within the legal period the limitation fails for remoteness. Thus a limitation to the first son of A., a bachelor, if he attains twenty two, vests when a son attains twenty-two; and is therefore void for remoteness. The question whether or no a given limitation is subject to a condition precedent, in other words, whether it is vested or contingent, is a question of construction, and is often of great difficulty. The subject is dealt with in another chapter (s). Limitation subject to condition precedent.

A limitation subject to a condition subsequent vests immediately; but in such a manner as to divest if the condition is broken. If the condition subsequent is too remote it is disregarded, and the limitation takes effect as if it were single and absolute (t). Limitation subject to remote condition subsequent.

When personal property is limited to two or more persons in succession, as to A. for life, and after his death to B., the interests for life and in remainder both vest, in a sense, immediately (u); that is to say, A. takes a life interest presently vested in possession, and B. takes a future interest which is not contingent, and which will fall into possession on A.'s death, and is transmissible to B.'s legal personal representatives on his death in A.'s lifetime. But the limitation to B. is nevertheless executory (x), and does not vest within the meaning of the Rule against Perpe- Future limitations of personal property.

(q) *Taylor v. Frobisher*, 5 De G. & Sm. 191; 21 L. J. Ch. 605; *Berkeley v. Swinburne*, 16 Sim. 275; 17 L. J. Ch. 416; *In re Edmonson's Estate*, L. R. 5 Eq. 389; 16 W. R. 890; *Armistage v. Wilkinson*, 3 Ap. Ca. 355; 47 L. J. P. C. 31.

(r) *King v. Cullen*, 2 De G. & Sm. 252; *Barnet v. Barnet*, 29 Beav. 239; *Williams v. Haythorne*, L. R. 6 Ch. 782, 788; *Simpson v. Peach*, L. R. 16 Eq. 208; 42 L. J. Ch. 816.

(s) *Infra*, p. 206.

(t) See *Wynne v. Wynne*, 2 Man. & Gr. 8, 14; 10 L. J. C. P. 23; *Blease v. Burgh*, 2 Beav. 221, 226; 9 L. J. Ch. 226; *Ring v. Hardwick*, 2 B. 352; 4 Jur. O. S. 242; and see *infra*, p. 278.

(u) *Monkhouse v. Holme*, 1 Bro. C. C. 297; *Benyon v. Maddison*, 2 Bro. C. C. 73.

(x) See Butler's note, F. C. R. 401.

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tuities until A.'s death ; that is to say, when, if the subject of limitation had been realty and the limitation executory, the donee would have acquired the seisin. Every future limitation of personalty, whether it is preceded or not by a prior limitation, and whether taking effect on a certain or uncertain event, is executory (*y*) ; and, like an executory limitation of real estate, must take effect, or vest, within the period allowed by the Rule against Perpetuities. We have seen that an executory limitation of real estate takes effect, or vests within the meaning of the Rule, when, and not before, the donee acquires by virtue of it the seisin of, or an estate in, the land. This is, in fact, the time at which the limitation takes effect in possession. The result, therefore, is that a future or executory limitation of personalty vests or takes effect within the meaning of the Rule when it takes effect in possession.

Since personal property is not the subject of tenure, a future limitation of personalty which, if the subject were realty, would take effect by way of remainder and vest within the legal period, may be void for remoteness. Thus a limitation to A. for twenty-two years, and then to B., whether he be then alive or dead, is valid in the case of real estate, and void for remoteness as to personalty. For a bequest twenty-two years after the testator's death to A. is in no better position as regards remoteness than a bequest to A. upon the failure of issue of B. ; and it has been held that the latter is clearly void for remoteness (*z*).

The rule of law which requires a contingent remainder to vest at or before the expiration of the particular estate makes a difference, not only as to the time of vesting, but also as to the capacity of a future limitation to take effect at all in certain events, according as the subject of limita-

(*y*) See Butler's note, F. C. R. 401 ; see also Lewis on Perp. 92, *sq.*, as to whether a limitation of a term of years at a future time is

good at common law.

(*z*) *Grey v. Montagu*, 3 B. P. C. 314 ; 2 Ed. 205.

tion is real or personal property. Thus a bequest of personalty to A. for life, and after the death of B. to C., takes effect whenever B. dies. A devise of real estate in the same terms (unless it is effected by 40 & 41 Vict. c. 33) takes effect only if B. dies in A.'s lifetime. Chap. II.

A mere possibility or chance of taking under a given limitation (as distinguished from a possibility coupled with an interest), although not transmissible or alienable at law, is, in a sense, an interest in the property which is the subject of limitation. It is true that it is alienable in equity, and an alienee will be entitled to the property, if the event happens upon which the alienor would have become entitled. But such a possibility, if indeed it can be properly called an interest in property (*a*), is at most a contingent interest, and the limitation under which it arises does not vest merely because the person entitled to such contingent interest is ascertained. Thus under an instrument creating a power of appointment amongst the children of A. nothing vests in the children before an appointment is made; so a limitation to the right heirs of a living person cannot vest before the death of the ancestor; although in the one case A. is dead, and in the other the heir apparent is living at the date of the limitation.

A contract giving one of the parties a right of pre-emption over the property of the other is, in effect, a disposition creating an interest in the property in favour of the person who has such right. But it does not take effect or vest within the meaning of the Rule against Perpetuities until the right of pre-emption is exercised. If that right is capable of being exercised beyond the legal period the interest arising under the contract is void for perpetuity (*b*).

(*a*) In 8 & 9 Vict. c. 106, it is distinguished from a "possibility coupled with an interest."

(*b*) *London and South Western*

Railway Co. v. Gomm, 20 Ch. D. 562; 51 L. J. Ch. 193, 530. See *supra*, p. 19.

A possibility distinguished from an interest in property.

Right of pre-emption arising under a contract.

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To a person or class to be ascertained at a given time.

A gift to the survivor of a class, or to such of the class as shall be living at a given time, vests when the survivor or persons to take are ascertained (c). And generally a limitation to an unascertained person or class vests when the person or class is ascertained (d). A limitation therefore (not of real estate by way of remainder) to the first son of A. who attains twenty-five (A. having no son of twenty-five at the time) is void for remoteness (e).

Of a sum to be raised or property to come into existence hereafter.

As a limitation cannot vest until the person or persons to take come into existence or are ascertained, so until the subject matter of limitation is in existence or ascertained there is no vesting. Thus a bequest of a sum of money charged on, and to be raised out of, land upon a future and contingent event is void for remoteness, if the event is beyond the line of perpetuity (f). So a gift of a share the amount of which is to be ascertained by reference to the constitution of a class of persons to be ascertained at a remote period is void (g). A trust to accumulate the rents of settled estates until a sum is raised equal in amount to the incumbrances subsisting on the estates at the testator's death, with a direction that the fund so raised shall be dealt with as constituting part of the settled estates, is also void for remoteness (h).

And we have seen that the limitation of a rent-charge, to arise upon a future event beyond the line of perpetuity, is void, though the grantee is a person in existence at the date of the limitation (i).

Gift of income periodically to A. "or his heirs."

A direction to pay the income of property periodically for a term of years to a person "or his heirs" (where these

(c) *Lachlan v. Reynolds*, 9 Ha. 796; 22 L. T. O. S. 211.

(d) See further as to limitations to unascertained persons and classes, *infra*, pp. 84—139.

(e) *In re Finch, Abbis v. Burney*, 17 Ch. D. 211; 50 L. J. Ch. 318.

(f) See *Merlin v. Blagrove*, 25 Beav. 125; *Boughton v. James*, 1

Coll. C. C. 26; 1 H. L. C. 406.

(g) *Hale v. Hale*, 3 Ch. D. 643; 24 W. R. 1065.

(h) See *Tewart v. Lawson*, L. R. 18 Eq. 490, 496; 22 W. R. 822; *Curtis v. Lukin*, 5 Beav. 147; 11 L. J. Ch. 380.

(i) *Supra*, p. 8.

words are not words of limitation) (*j*) does not vest the property for the term in the person named. If the term is for more than twenty-one years, the whole will be void for remoteness. Thus in *Speakman v. Speakman* (*k*) there was a trust, during fifty years from the testator's death, once in every three years, to divide the surplus income of real estate (after satisfying certain payments directed by the will) amongst the testator's children, "or their lawful heirs instead of any one that might happen to be dead." It was held that the trust required payment of the surplus income during the fifty years to the testator's children, or, in case of their deaths, to such of their lineal descendants as might from time to time be in existence. There was a trust at the expiration of the fifty years to sell the land and pay the proceeds to the children "or their heirs," which was also held void for remoteness.

A trust to sell property upon an event or at a time which is beyond the line of perpetuity, and to divide the proceeds of sale amongst a class to be ascertained within the line, with a trust of the income of the property meanwhile for the same persons, is valid as a limitation of the property to the persons named. The trust for sale is void for remoteness, but the property vests within the legal period. In *Goodier v. Johnson* (*l*) there was a trust to sell lands upon the death of the survivor of an unmarried son of the testator and his wife, and to divide the proceeds amongst the testator's grandchildren, followed by a trust of the rents and profits, until sale, for the grandchildren. It was held by the Court of Appeal that the grandchildren were entitled to the lands, though the trust for sale was void for remoteness. In *Lachlan v. Reynolds* (*m*) there was a trust to sell freeholds and leaseholds at the end of thirty years from the testator's death, and to divide the

(*j*) As they were in *Lachlan v. Reynolds*, 9 Ha. 796; 22 L. T. O. S. 211.

(*k*) 8 Ha. 180.

(*l*) 18 Ch. D. 441; 51 L. J. Ch. 369.

(*m*) 9 Ha. 796; 22 L. T. O. S. 211.

Gift by way of trust for sale and division of the proceeds.

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proceeds amongst such of the testator's children as should then be living. It was held that there was a valid gift to such of the children as were living at the end of thirty years from the testator's death. In this case the trust for sale was valid, since it must arise, if at all, within a life in being.

To A., or his children, by substitution.

In the case of a substitutional gift the time of vesting is the death of the first taker, or other event upon which substitution is to take place. Thus a limitation upon a future event to A., or (by substitution) his children, is valid as regards the children if it is valid as to A. It vests, if at all, upon the death of A., a person living at the date of the limitation. A fund was bequeathed, after the death of the testator's daughter and any husband she might have surviving her, to four persons by name "who shall then be living, or to the lawful issue of such of them as shall be then dead." It was held that such of the children of one of the four who died in the lifetime of the daughter (then a widow) as survived their parent took vested interests, and that the gift was not too remote (*n*). Where the primary limitation is contingent, the substitutional limitation is in like manner contingent, and will not vest until the contingency is determined (*o*).

Class limitations.

It has been already stated, with reference to limitations to a class, that under a limitation to such of the children of A. as attain a given age, or fulfil any other condition or description, no child can take who fails to answer the description. In class limitations, therefore, the ascertainment of the class and the vesting are usually simultaneous. Until the class is finally ascertained, and the amount of each share is determined, there is no such vesting as will satisfy the Rule against Perpetuities. A class limitation does not vest by instalments, so as to be good as to part,

(*n*) *In re Merrick's Trusts*, L. R. 1 Eq. 551.

(*o*) The donee by substitution may take an interest which though not

vested is transmissible; as in *In re Orlebar's Settlement*, L. R. 20 Eq. 711; 44 L. J. Ch. 661.

and as to other part void for remoteness. Though the maximum number of members of the class, and therefore the minimum amount of each share, is ascertainable within the legal period, the whole limitation is void for remoteness unless the actual number of members of the class, and the actual amount of each share, is ascertainable within the same period. There is no vesting of a minimum share, and afterwards of an increment to that share, upon the death of one of the possible members of the class. Thus a gift to such of A.'s children born within twenty-one years after the testator's death as attain twenty-two is void for remoteness altogether, because it does not vest until twenty-two years after the testator's death. It cannot take effect even as to the minimum share to which every child who is living at the expiration of the twenty-one years, or has attained the age of twenty-two before that date, will be entitled in the event of all the children then living attaining twenty-two (*p*).

A limitation to a class upon a contingent or future event (*q*) vests when the event happens. If, therefore, the event is such that it will not necessarily happen within the legal period, the limitation is void for remoteness, and that although the class is ascertained within the legal period, or even at the testator's death.

Limitation to a class upon a contingent event.

The application of the Rule against Perpetuities to class limitations is fully discussed in another chapter (*r*).

A limitation such as that in *In re Lechmere & Lloyd* (*s*)—to A. for life, and after his death to such of his children as, either in his life or after his death, attain a given age—vests in a sense as soon as a child of A. attains the given age. But such vesting is not absolute, nor does it satisfy the Rule against Perpetuities. It is liable to “open” so

Vesting *sub modo*—so as to open and let in other takers.

(*p*) See *infra*, p. 89.

L. J. Ch. 661.

(*q*) As in *In re Orlebar's Settlement Trusts*, L. R. 20 Eq. 711; 44

(*r*) *Infra*, p. 84.

(*s*) 18 Ch. D. 524.

Chap. II. as to let in children subsequently attaining the given age (*t*).

Immediate
vesting with
deferred
possession or
payment.

The question whether, when a future time or event, such as the attainment by the legatee of a given age, is named for the payment of a legacy, the time named for payment must arrive before the legacy vests, is a question of construction. The subject is considered in another chapter (*u*).

(*t*) F. C. R. 312; 1 Jarman on Wills, 238, 239, 3rd ed.; in the fourth edition of Jarman on Wills

(p. 264, vol. i.) the text is different.
(*u*) *Infra*, p. 206.

CHAPTER III.

REMOTENESS MAY EXIST THOUGH THE PROPERTY DOES
NOT CEASE TO BE ALIENABLE.

It is not a sufficient test of the validity or remoteness of a limitation that, notwithstanding the limitation, the fee simple or the absolute interest in the property which is the subject of limitation can be alienated within the legal period. The books abound with cases in which limitations valid according to this test have been held void for remoteness.

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Remoteness
may exist
though the
property does
not cease to
be alienable.

Where property is limited to two or more persons in succession, the validity of each successive limitation depends upon the question whether it vests within the legal period. The fact that, if all the persons entitled to future interests concur, a good title to the property may be made within the legal period, is not inconsistent with remoteness in the limitation of one or more of the future interests. Thus a limitation to A. in fee, and upon failure of A.'s issue at any time to B., is void for remoteness as to B. (a); and that although B. is a person in existence at the date of the limitation, and the property is immediately alienable, if A. and B. concur. Notwithstanding the elementary character of this proposition, it has not always been assented to; and there are *dicta*, and even decisions, contradicting it. In a very recent case (b) it was argued that

(a) F. C. R. 429.

Railway Co. v. Gomm, 20 Ch. D.(b) *London and South Western*

562; 51 L. J. Ch. 193, 530.

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there could be no remoteness where the person entitled under the future limitation was in existence and capable of releasing or conveying his interest. Mr. Justice Kay, however, stated the law in these terms, which were assented to by the Court of Appeal: "In my opinion a present right to an interest in property which may arise at a period beyond the legal limits is void, notwithstanding that the person entitled to it may release it. It would be a great extension of the power of tying up property to hold otherwise. If the owner in fee of an estate, or the absolute owner of any property, could be fettered from disposing of it by a springing use, or executory devise, or future contingent interest, which might not arise till after the period allowed by the Rule, it would be easy to tie up property for a very long time indeed. The present interest under executory limitations might be vested in an infant, a lunatic (c), or a person who would refuse to release it; and thus the estate would be practically inalienable for a period long beyond the prescribed limit. That is clearly not law."

Limitation to a living person on failure of issue of a person named.

The principle here laid down applies to all future limitations, whether of real or personal property. A bequest to living persons, upon failure of issue of a person named, is void for remoteness (d). So in a recent case (e) a bequest to Magdalen College, Oxford, upon failure of issue of A., was held by Wood, V.-C., without argument, to be void for remoteness. Again, by a settlement before marriage, real estate was limited to the use of A. for life, remainder to A.'s issue born in his lifetime, as he should appoint. A. appointed to his son B. in fee, and, in case B. should have no son who should attain twenty-one, to a grandson, C., in fee. The appointment to C. was held void for remoteness (f).

(c) The Rule against Perpetuities does not provide against property being inalienable by reason of infancy or lunacy; *supra*, p. 21.

(d) *Grey v. Montagu*, 3 B. P. C.

Toml. 314; 2 Ed. 205.

(e) *In re Johnson's Trusts*, L. R. 2 Eq. 716; 12 Jur. N. S. 616.

(f) *In re Brown and Sibley's Contract*, 3 Ch. D. 156.

In the same way a limitation to a class of which all the possible or contingent members are ascertainable within the legal period, but of which the actual members are not so ascertainable, is too remote; and not the less so because, with the concurrence of all the possible members of the class, the property is alienable within the legal period.

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Cases in which limitations have been held void for remoteness notwithstanding the alienability of the property.

In *Hale v. Hale* (g) there was a gift, after the death of the testator's widow, to the testator's children and grandchildren (children of a deceased child) who should attain twenty-four. In *Garland v. Brown* (h) the ultimate limitation was, in effect, to the survivor of the children of the testator's surviving child. And in *Blight v. Hartnoll* (i) the gift was to such of the testatrix' grandchildren living at a remote period as the testatrix' daughter should appoint. All these were held void for remoteness. In each case it is evident that all the persons who by possibility could take under the limitation in question, being grandchildren of the testator, were ascertainable within the legal period; and, concurring, they could have made a good title to the property, and alienated within the legal period. In no one of them was it suggested that this fact prevented the application of the Rule against Perpetuities.

Again, where a rent charge or a term of years is limited to arise at a future time, not necessarily within the legal period, in favour of a person in existence at the date of the limitation, there is little doubt, notwithstanding some *dicta* to the contrary, that the limitation is void for remoteness (k).

In *Curtis v. Lukin* (l) are some valuable observations of Lord Langdale upon the question under consideration. In that case a testator, before the passing of the Thelluson Act, bequeathed leaseholds in Church Street having sixty

The true doctrine stated in *Curtis v. Lukin* by Lord Langdale.

(g) 3 Ch. D. 643; 24 W. R. 1065.

(h) 10 L. T. N. S. 292.

(i) 19 Ch. D. 294; 49 L. J. Ch.

(k) See *supra*, p. 8.

(l) 5 Beav. 147; 11 L. J. Ch.

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years to run and renewable at the option of the lessor to A. for life, with remainder to A.'s children living at his death, and in default of children of A., to B. He bequeathed to trustees other leaseholds upon trust to accumulate the rents until the Church Street leaseholds were nearly expired, and then to apply the accumulations in renewing the Church Street leases for the benefit of the persons entitled under the will, and to hold the residue (if any) in trust for other persons. The trust for accumulation was held void for remoteness and uncertainty. It was contended that there was no remoteness, because the persons entitled to the Church Street leaseholds together with the persons entitled to the surplus rents of the other leaseholds, not required for renewals, could at the latest twenty-one years after A.'s death, put an end to the accumulation and dispose of the fund. With reference to this argument Lord Langdale said: "Now the persons who would be entitled in that event (the expiration of twenty-one years from A.'s death) would be the children which A. might leave, and the persons entitled to the residue of the money after answering the purposes which the testator intended to be effected. They might all be in a state competent to consent. Nevertheless, in that state of things, it is perfectly manifest that, although amongst themselves they might make a title to the fund to be accumulated for renewal, yet each of them would be uncertain as to the amount of his share, or of that which was his; no one of them could say, Such a share of this property is mine; I have a right to sell or dispose of it as I please; and in doing so I am acting according to the intention of the testator. In all cases of this kind, I apprehend, we are to look at the directions of the will with reference to the property of the testator at the time of his death, and with reference to the persons who, under the directions of the will and according to the intention of the testator, may at a future period have a legal power to dispose of the pro-

perty. If, according to the intention of the testator, some person or persons must not necessarily be in existence with legal power to dispose of the property within the period limited by the rule of law, then I apprehend the gift is too remote. Now here such was not the intention of the testator. The intention, according to the argument which is used, was, that the accumulation should go on, as to part of this at least, until the period when the last lease was about expiring—that is until 1863, which period, it is evident, might be beyond that limited by law. If the contrary were done, it would be done, not in pursuance of any power given to them by the will, but in consequence of a power which they have of coming to an arrangement amongst themselves, by which they compromise their respective claims under the will, and create for themselves aliquot defined shares in this part of this property; doing, that for themselves, but proceeding in a manner directly contrary to the intention of the will.”

In *Blight v. Hartnoll* (*m*) Fry, J., thus stated the reason of this application of the Rule against Perpetuities to cases where all the possible, but not the actual, persons to take are ascertainable within the legal period: “The Rule against Perpetuities requires, in my view, the ascertainment, within the period, not only of the extreme limits of the class of persons who may take, but of the very persons who are to take; and that because the Rule is aimed at the practical object of telling who can deal with the property; and, if you cannot tell who are entitled to the property, but only who may become entitled to the property, the property is practically tied up.”

It will be convenient here to notice some cases and *dicta* to the effect that a right or interest to arise upon a remote event, but presently vested in an ascertained person, is not open to the objection of remoteness. But it must be understood that this is not the law; that it is now well

Cases in which it has been held or implied that a limitation is not void for remoteness, if the property

(*m*) 19 Ch. D. 294, 300; 49 L. J. Ch. 255.

Chap. III. settled that a future interest which does not vest within the legal period is void for remoteness; and that it is immaterial who the person entitled under such a limitation may be, that is to say, whether he is ascertained at the date of the limitation, or a person who may not be ascertained until after the expiration of the legal period.

Washbourne v. Downes. In *Washbourne v. Downes* (n) it was stated to be a perpetuity "where if all that have interest join yet they cannot bar or pass the estate." In *Scattergood v. Edge* a perpetuity was defined as "an estate unalienable though all mankind join in the conveyance."

In later cases where the question of remoteness has arisen the test applied has been whether the effect of the limitation in question was to render the fee simple of the land inalienable.

Gilbertson v. Richards. In *Gilbertson v. Richards* (p) one Billings, being entitled to the fee simple of certain lands, agreed to sell them subject to the payment by the purchaser to him of £40 a year, for which he was to have a power of distress. Then he and the purchaser mortgaged the property by a deed which contained a proviso that if the mortgagee, or any one claiming under him, should enter into possession the premises should thenceforth be charged with the payment to Billings, his heirs and assigns, of the annual sum of £40. It was contended that the limitation of the rent of £40 was void for remoteness. As to this Martin, B., said: "The second objection was that it (the rent) was void for remoteness; that it was to arise at any time, however distant, when the parties of the fourth part (the mortgagees), or their heirs, might enter into the land, and therefore might arise long after the time prescribed by law against perpetuity. It is quite true that no rent can be lawfully

(n) Ch. Ca. 213; see observations of Kay, J., on this case in *London and South Western Railway Co. v. Gomm*, 20 Ch. D. 562; 51 L. J. Ch. 193. (p) 1 H. & N. 277; 5 H. & N. 453; 28 L. J. Ex. 188; 29 L. J. Ex. 213. The statement of the case in the text follows that of Kay, J., in 20 Ch. D. 570.

(o) 1 Salk. 229.

created which violates the law against remoteness, and therefore a rent could not be granted to the son of an unborn son. But it seems to be an error to call this rent a perpetuity in an illegal sense. It is vested in Thomas Billings (the mortgagor) and his heirs. He or his heirs may sell it or release it at their pleasure. A rent in fee simple may be granted to a man and his heirs to continue for ever. Why, therefore, may not one be granted to commence at any time, however remote? It is only part of the estate in fee simple of the rent. A perpetuity arises when a rent is granted to a person who may not be *in esse* until after the line of perpetuity be passed; but when the estate in the rent is vested in an existing person and his heirs in fee simple, who may deal with it at his or their pleasure, and as he or they think fit, we think it is not subject to the law of remoteness, notwithstanding that its actual enjoyment may depend upon a contingency which may never happen, or may happen at any time however distant. For these reasons we think the rent was well created, and that the distress for it was lawful."

The Exchequer Chamber affirmed the decision of the Court below as to the validity of the rent with regard to perpetuity. Wightman, J., in delivering the judgment of the Court, said (q): "There may be considerable doubt also on the point raised by counsel whether the Rule as to Perpetuities applies to a case like the present, where the party who or whose heirs are to take is ascertained, and who can dispose of, release, or alienate the estate, either at common law, or at all events since the passing of 8 & 9 Vict. c. 106, s. 6" (r). The decision in this case as to the validity of the limitation of the rent can, as pointed out elsewhere (s), be supported on other grounds than those given by Martin, B., and Wightman, J.; and the reasons

(q) 5 H. & N. 458.

(s) See p. 248, *inf.* And see also(r) As to this Act, see *infra*, Sugd. Pow. 8th ed. 16.
p. 66.

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given for the decision, as above stated, must be taken to be extra-judicial. Lord St. Leonards nevertheless appears to have considered that they constituted an important distinction in the law of perpetuity (*t*).

*Birmingham
Canal Co. v.
Cartwright.*

In a recent case (*u*) there was a conveyance by the vendor of a plot of freehold land to the purchaser. The mines were reserved to the vendor, and the vendor, for himself, his heirs, executors, administrators, and assigns, covenanted with the purchaser, his heirs and assigns, that in case he (the vendor), his heirs or assigns, should thereafter at any time sell or agree to sell to any person the mines under certain adjoining lands belonging to him, he, his heirs or assigns, would at the same time offer to the purchaser of the plot, his heirs and assigns, the mines under the plot, at the same price as the mines under the adjoining lands were to be sold for; and that if within a month of such offer the purchaser, his heirs or assigns, should agree to buy, the vendor, his heirs or assigns, would convey to the purchaser, his heirs and assigns, the mines under the plot. It was held by Fry, J., that the covenant was not void for remoteness, and could be enforced against the devisees of the vendor by the assign of the purchaser. "I think," he said (*x*), "that whenever a right or interest is presently vested in A. and his heirs, although that right may not arise until the happening of some contingency which may not take effect within the period defined by the Rule against Perpetuities, such right or interest is not obnoxious to that Rule, and for this reason: The Rule is aimed at preventing the suspension of the power of dealing with the property—the alienation of land or other property. But when there is a present right of that sort, although its exercise may be dependent upon a future contingency, and the right is vested in an ascertained

(*t*) Sugd. Pow. 8th ed. 16.

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(*u*) *Birmingham Canal Co. v. Cartwright*, 11 Ch. D. 421; 48 L. J.

(*c*) Pp. 432, 433.

person or persons, that person or persons concurring with the person who is subject to the right, can make a perfectly good title to the property. The total interest in the land, so to speak, is divided between the covenantor and the covenantee, and they can together at any time alienate the land absolutely. I think that *Gilbertson v. Richards* (y) is a distinct authority in favour of that conclusion.”

In *Collison v. Lettsom* (z) no objection on the ground of remoteness was taken to a covenant to give a right of pre-emption during a period of twenty-eight years.

In *Routledge v. Dorril* (a) Sir R. P. Arden gave it as a reason for supporting a remainder expectant upon the death of an unborn tenant for life, that the tenant for life and the remainderman could together dispose of the fee within the legal period.

In *Gooch v. Gooch* (b) Cranworth, C., appears to have thought it sufficient if the fee could be disposed of within the legal period by all the persons taking contingent future interests acting together. *Avern v. Lloyd* (c) and *Ashley v. Ashley* (d), mentioned elsewhere (e), point in the same direction as these cases; but are difficult to reconcile with *Garland v. Brown* (f). So far as they are inconsistent with *Garland v. Brown* it is submitted that the latter case is the preferable decision. *Avern v. Lloyd*, so far as need here be stated, was a limitation to a class of unborn issue for life, and to the executors, administrators, and assigns of the survivor. Romilly, M.R., held that, the contingent future interest of every tenant for life being alienable within the legal period, the Rule against Perpetuities did not apply, and the limitation of the absolute interest to the survivor of them was good. In *Keppell v. Bailey* (g) Lord Brougham emphatically

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Keppell v. Bailey.

(y) *Supra*, p. 56.

(z) 6 Taunt. 224.

(a) 2 Ves. 256, 266.

(b) 3 D. M. & G. 366, 384; 22 L. J. Ch. 1089.

(c) L. R. 5 Eq. 383; 37 L. J. Ch.

489.

(d) 6 Sim. 358; 3 L. J. Ch. 61.

(e) *Infra*, p. 177.

(f) 10 L. T. N. S. 292; *infra*, p. 180.

(g) 2 M. & K. 517.

Chap. III. repudiated the notion that a covenant by the grantee of land to give another person certain benefits in connection with the land was void for perpetuity. He said that such a covenant is no more struck at by the doctrine of perpetuity than a right of way or other easement which the owner of one estate may enjoy over the close of another (*h*). In *Keppell v. Bailey* the lessees of ironworks covenanted with a railway company to get the limestone to be used at their works from a certain quarry, and carry it by the company's railway. Lord Brougham said that such a covenant is no restraint upon alienation, since the landowner and the person entitled to the benefit of the covenant can together always alienate the land.

In Ireland a trust of lands to indemnify thereout a purchaser of other lands in the event of his title to the latter proving defective was held good (*i*).

In *Daniel v. Stepney* (*k*), upon a demise of mines for forty years, a power of distress for rent reserved by the lease was given to the reversioners over lands not comprised in the lease and described as "any lands in which there shall be, for the time being, any pits or openings by or through which the coal or culm by the said deed demised shall for the time being be in the course of working by the lessees, their executors, administrators, and assigns." It was held that as against a purchaser of the land with notice the power was valid and exercisable by the lessor. It does not appear to have been suggested that it was void for remoteness even as regards an assignee of the reversion.

In *Wood v. Drew* (*l*) Romilly, M.R., treated it as plain that a devise of lands to secure the performance of a covenant that might be broken sixty years after the testator's death was free from objection on the ground of remoteness. The case was as follows:—A testator

(*h*) As to this, see *supra*, pp. 13, ed. 44; *supra*, p. 11.
 20. (*k*) L. R. 7 Ex. 327; on app. *ib.*
 (*i*) *Masscy v. O'Dell*, 10 Ir. Ch. 9 Ex. 185; 41 L. J. Ex. 208.
 Rep. 22; but see Sugd. Pow. 8th (*l*) 33 Beav. 610.

bequeathed five leasehold houses having about fifty-four years to run to his daughter for life, with remainder to her children. And he directed the trustees of his freeholds, after the expiration of any of the leases, to convey to his daughter for life, with remainder to her children, at her or their request, one or more of his five freehold houses, equal, or as nearly equal as might be, in value to the expired leasehold; and so that the freehold houses so conveyed should, if exceeding in value the corresponding leaseholds, be charged with such excess in value. It was held by Romilly, M.R., that the devise was valid, and that the trustees were bound, at the request of the daughter's children, to convey the freeholds as directed by the will. It was contended that the gift was void for remoteness and uncertainty, because, although the persons to take were ascertained within the period allowed by law, the ownership of the freeholds could not be ascertained until the expiration of the leases, which might not happen until beyond the legal period. The Master of the Rolls said that there was no uncertainty, and that the case came within the ordinary rule, that that is certain which can be rendered certain. There was no more difficulty than if the testator had directed that property producing a certain sum a year should be conveyed to the daughter for life, with remainder to her children; or if he had devised land to answer a covenant which he had entered into and which might be broken sixty years after his death.

In *Pollock v. Booth* (*m*) there was a covenant by the lessor for renewal of the lease for lives for ever, the lives to be taken being lives of a specified family. A proviso was added that, if anyone entitled to the lease should alienate, the lessor should have power to re-enter at any time during the life of the person alienating. The proviso was held valid, on the authority of *Keppell v. Bailey* (*n*).

(*m*) Ir. Rep. 9 Eq. 229; *ib.* 607.

(*n*) *Supra*, p. 59.

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In *Ex parte Ralph* (o) a contest arose as to the terms of a conveyance which was to carry into effect a contract for the sale of land, one of the terms of the contract being that the conveyance should contain a covenant by the purchaser and his assigns against building, "and proper provisions for securing the due observance and performance thereof." The clause ultimately agreed upon, and which was suggested by the Court, contained a proviso for re-entry by the vendors upon breach of the covenant; the operation of the proviso being expressly confined to the lives of the parties to the conveyance and twenty-one years after the death of the survivor. This limitation of the proviso for re-entry was probably *ex abundante cautela*. There was no decision that, if it had been unlimited in point of time, the proviso would have been void for remoteness (p).

The question
settled by

*London and
South Western
Railway Co.
v. Gomm.*

It is not possible to reconcile some of these decisions and *dicta* with the rule that a limitation, to be valid, must vest within the legal period. The future interests of which the validity was in question in some of the cases arose, not by way of executory limitation, but under covenants. As to these the question is settled by *London and South Western Railway Co. v. Gomm* (q), a recent decision of the Court of Appeal. In that case a railway company, having power to sell superfluous lands, sold the fee simple of a piece of land which they did not want at the time, but probably would eventually require for their works. In the conveyance the purchaser, for himself, his heirs, executors, administrators and assigns, covenanted with the company that he, his heirs and assigns, owner and owners for the time being of the land, would at any time thereafter, whenever the land might be required for

(o) De Gex, 219.

(p) In Davidson's Precedents, Vol. 2, Pt. 1 (4th ed.), p. 511, note (q), it is stated that the power of entry would have been unobjectionable on the ground of perpetuity if it had been unlimited in point of

time. But, to avoid question, a limited power similar to that in *Ex parte Ralph* is adopted in the precedent contained in the text.

(q) *London and South Western Railway Co. v. Gomm*, 20 Ch. D. 562; 51 L. J. Ch. 193, 530.

works of the company, upon having certain notice and receiving from the company the amount of the purchase money, re-convey the land to the company. It was held by Kay, J., that this covenant could, after the purchaser's death, be enforced by the company against the owner of the land for the time being, who had acquired it with notice of the covenant. He dissented from the doctrine of *Birmingham Canal Co. v. Cartwright*, as stated above (r); but he considered that the case came within the doctrine of *Tulk v. Moxhay* (s). This decision was reversed on appeal. The grounds of the reversal appear from the judgment of Jessel, M.R., from which the following passages are extracted: "Is it (the benefit of the covenant) within the Rule (against Perpetuities)? That, as it appears to me, depends upon this—Is it, or is it not, an interest in the land? If it is a mere personal contract, it is not, of course, obnoxious to the Rule at all. But in that case it is impossible to see how the present appellant can be bound. He did not enter into the contract. He is only a purchaser from the person who did. Consequently those who argue that it is a mere personal contract argue at the same time that it is one which cannot be enforced against the assignee. Therefore they must admit that it binds the land somehow. But if it binds the land it is an equitable interest in the land; the right to call for a conveyance is an equitable interest or equitable estate (t). In the ordinary case of contract for purchase there is no doubt of it; and an option to purchase in its nature does not differ. It is only one step further back—that is, a person exercising the option has to do two things; he has to give notice of his intention to purchase, as well as pay the purchase money. But as far as the man who is liable to convey is concerned, his estate

(r) P. 58.

(s) 2 Ph. 774; 18 L. J. Ch. 83.
See *supra*, p. 16, *seq.*(t) Lord Eldon, in *Carleton v.**Leighton*, 3 Mer. 667, 672, note, expressed a contrary opinion; but that of Jessel, M.R., seems preferable.

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or interest is taken away from him without his consent; and, the right to take it away being vested in another, it must give that other an interest in the land. It appears to me, therefore, to be plainly an interest in the land, and if that is so, there is no distinction that I know of in equity (unless the case falls within one of the exceptions, like charities) between one kind of equitable interest and another. In all cases they must take effect as against the owners of the land within a prescribed period. Then it was suggested that this rule has no application to a case of contract. But the mode in which the interest is created is immaterial; whether it is by devise, or voluntary gift, or contract, can make no difference. The question is, What is the nature of the interest intended to be created?" The Master of the Rolls then cites the passages from Lewis on Perpetuities, p. 164 (*u*), defining a perpetuity, and proceeds: "Now is there any substantial distinction between a contract for purchase, an option for purchase, and a limitation on condition or conditional limitation? Is there any difference in substance between these: (*a*) a limitation to A. in fee, with a proviso that whenever B. or his heirs sends A. or his heirs a notice in writing and pays £100 the estate shall vest in B. and his heirs, and (*b*) a contract that if B. gives notice and pays £100 A. shall convey to B. and his heirs? It seems to me that in a Court of Equity it is impossible to suggest any real distinction."

In the Court below Kay, J., had expressed his dissent from the decisions in *Birmingham Canal Co. v. Cartwright*, and *Gilbertson v. Richards*, so far as they support the doctrine that a future interest in property, which is presently vested in an ascertained person, cannot be void for remoteness. In the Court of Appeal, Jessel, M.R., and Lindley, L.J., expressed their concurrence with Kay, J., on this point, and agreed that the cases above mentioned

(*u*) See *supra*, p. 1.

must be considered as overruled by their present decision. It should be added that all the members of the Court of Appeal considered that the *London and South Western Railway Co. v. Gomm* was wrongly decided in the Court below on another ground, namely, that the covenant was *ultra vires* as regards the railway company. But the question of perpetuity having been very fully discussed, the case must be taken as settling the law on the subject under consideration.

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In no case has it been held that an executory or springing use of real estate to take effect upon a remote event is valid merely because the person to take is ascertained within the legal period. Notwithstanding the *dicta* in *Gilbertson v. Richards* and other cases above stated, it is submitted that such a limitation is clearly void. A similar executory limitation or trust of personal property is in no better position.

That a limitation may be void for remoteness although the property can, notwithstanding the limitation, be alienated within the legal period, appears also upon a comparison of limitations by way of legal remainder with similar limitations taking effect by way of executory use or trust. It will be seen that the test of remoteness is, not that the property is alienable within a certain time, but that the limitation vests within a certain time. A limitation of real estate to A. for 1000 years, with remainder to B. in fee, is valid, provided B. is ascertained within the legal period (*x*); a limitation of real estate to A. in fee, and upon failure of A.'s issue to B. in fee, is void for remoteness. There is no valid ground for holding the property to be less alienable in the one case than in the other. The capacity of B. to alienate his future interest, and of A. and B. together to alienate the entire property, is identical in the two cases. But in the one

The same result follows from a comparison of limitations of real estate by way of remainder with executory limitations.

(*x*) 6 Cr. Dig. 4th ed. 380; F. C. R. 431; *Gore v. Gore*, 2 P. W. 28.

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case the freehold is presently vested in B., in the other the limitation to B. is executory, and therefore subject to the rule which requires it to vest within the legal period. The result is anomalous; but the history of the Rule against Perpetuities furnishes the explanation.

The Act 8 & 9 Vict. c. 106, does not affect the question.

With reference to the suggestion (*y*) that the power to alienate at law future contingent interests, which was created by 8 & 9 Vict. c. 106, s. 6 (*z*), has altered the law of remoteness, it is submitted that that Act does not affect the question considered in this chapter. The power of alienating future interests in real as well as personal property has always existed in equity (*a*). The statute merely enabled an alienor in certain cases to clothe his alienee with the legal as well as the equitable title (*b*).

The existence of a power of alienation created by the instrument or by statute is immaterial.

A limitation taking effect beyond the legal period will be void for remoteness, notwithstanding the existence of a power of alienation in the trustees of the settlement, or in the successive tenants for life, or other limited owners under the Settled Land Act, 1882 (45 & 46 Vict. c. 38).

(*y*) See p. 57, *supra*.

(*z*) Repealing 7 & 8 Vict. c. 76, s. 5.

(*a*) See notes to *Ryall v. Rowles*, 1 Ves. sen. 348; 2 White & Tudor's Lead. Cases in Equity.

(*b*) The question considered in this chapter is discussed in Lewis on Perp. Appendix, pp. 19, *seq.*; Williams' Settlement of Real Estate, pp. 31, 32; Williams' Real Property, Appendix, F.

CHAPTER IV.

RE MOTENESS AS A QUESTION OF EXPRESSION.

A LIMITATION may sound remotely, or have the appearance of remoteness, when a consideration of the circumstances to which the instrument has to be applied will show that no question of remoteness can arise. Thus a limitation to the first son of A. who attains twenty-five is valid, if there is a son of A. living at the testator's death who has attained twenty-five; otherwise it is void for remoteness. So an appointment, under the ordinary power in an ante-nuptial marriage settlement, to such persons as a child of the marriage "shall by any deed executed either before or after her marriage appoint," was held valid, the child being, in fact, married at the time the original power was exercised (*a*).

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A limitation sounding remotely is not void if the facts exclude the possibility of remoteness.

In *Slark v. Dakyns* (*b*) a testatrix, with power to appoint to her children born before or after the creation of the power, appointed the fund in equal fifth shares to her five children respectively for life, with remainder as they should respectively by will appoint. All the five children were born at the creation of the power. It was held by Lord Cairns, C., affirming the decision of the Court below, that the power to appoint by will was valid, although it would have been void for remoteness had

(*a*) *Morgan v. Gronow*, L. R. 16 35; 42 L. J. Ch. 524; 44 L. J. Ch. Eq. 1; 42 L. J. Ch. 410.

(*b*) L. R. 15 Eq. 307; *ib.* 10 Ch.

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the donees not been born before the creation of the power (c).

Again, in *Picken v. Matthews* (d) the gift was by will to the children of the testator's daughter who should attain twenty-five. A child having attained twenty-five in the testator's lifetime and survived him, the class was ascertained, at the latest, when the youngest child living at the testator's death attained twenty-five. The gift, which would have been void for remoteness had there been no child of twenty-five living at the testator's death, was therefore valid.

So a limitation expressed to take effect upon a remote event may be valid by reason of the subject matter of the limitation; as where a reversion in lands expectant upon the death of the testator's son without issue living at his death is devised upon the son's death without issue generally (e); or where the property is of short duration (*sup.* p. 24). And so also of a limitation under a power operative only within the legal period; *ibid.*

Facts not admissible for the purpose of ascertaining the construction and application of the instrument upon the question of remoteness.

But the ordinary rules of construction will not be relaxed for the purpose of admitting parol evidence to show the testator's intention, merely in order to give effect to a limitation which would otherwise be too remote. Where there was a gift by will to A. for life, with remainder to her children, with remainder to her grandchildren, it was held that parol evidence was not admissible merely for the purpose of showing that A. was past childbearing at the date of the will, and that therefore the testator intended children then living (f).

So in the leading case of *Jee v. Audley* (g) the bequest was of £1000 (in effect) to the present and future children

(c) The decision of the Court below was affirmed also on other grounds.

(d) 10 Ch. D. 264; 48 L. J. Ch. 150.

(e) It was so held in *Lewis v. Templar*, 33 Beav. 625; 10 L. T.

N. S. 638; where *Bankes v. Holme*, 1 Russ. 394, n., is spoken of as "a very strong case;" and see *Eno v. Eno*, 6 Hare, 171.

(f) *In re Sayer's Trusts*, L. R. 6 Eq. 319; 36 L. J. Ch. 350.

(g) 1 Cox. 324; 2 Ves. 365.

of A., a living person, who should be living when the issue of B. should fail. Sir J. Kenyon refused to assume that A., who was of very advanced age, was past childbearing; and the bequest was held void for remoteness.

In *Cooper v. Laroche* (h) the gift was by will to two persons for life, and after the death of the survivor to the children of A. and B., the shares of daughters to be settled upon them for life for their separate use without power of anticipation, with remainder over. A. was dead at the testator's death, and B. was past childbearing. Under these circumstances Malins, V.-C., held that the direction to settle was not void for remoteness. From *Jee v. Audley* and *In re Sayer's Trusts* it would appear that the fact of B. being past childbearing is immaterial upon the question of remoteness. Neither of those cases was cited in *Cooper v. Laroche*, and the latter case would probably not be followed.

Expressions, having an appearance of remoteness, but which are, in fact, merely inartificial descriptions of the estate or interest intended to be limited, do not vitiate a limitation which will take effect within the legal period, and is, in fact, unobjectionable on the ground of remoteness. Thus a direction in a will that A. shall take for life, and after his death his eldest son for his life, and so on, the eldest son of the A. family inheriting for ever—being a description of the course of devolution of an estate tail—may take effect as a limitation of an estate tail to A. or his son (i). So in *Cormack v. Copous* (k) there was a devise of lands in trust for A. for life, and after his death in trust for all his children equally, “and all their children and their heirs for ever.” It was held that the children of A. took as tenants in common in fee.

Remoteness not imported by words descriptive of the duration of the estate limited.

(h) 17 Ch. D. 368; 29 W. R. 438. L. R. 2 Eq. 799; *ib.* 3 Ch. 93; 16 W. R. 290.

(i) See *Forsbrook v. Forsbrook*, (k) 17 Beav. 397.

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In *Nicolls v. Sheffield* (*l*), before Sir Lloyd Kenyon, M.R., it was contended that the name and arms clause in a strict settlement of real estate was void for remoteness. He held that it was valid, and said that if the estate tail were not barred it might operate at any distance of time: "I might as well be told that an estate tail is an illegal estate, because it may endure for ever; and must, when the reversion is in the Crown."

And it will be seen in a subsequent chapter (*m*) that a trust to settle lands in a manner which, if carried out literally, would be void for remoteness, is not altogether void, but will be carried out in such a way as to effect the intention, so far as the law allows.

So a direction to accumulate income, until a sum is raised which may not be reached within the legal period, is not void for remoteness, provided the gift of sum itself is such that it must vest within the legal period, and the donee may at any time put a stop to the accumulation (*n*).

A gift by will of the rents or income of property, or a trust to pay rents or income, to a person and his heirs or representatives for ever is, in effect, an immediate gift of the fee simple of the land or of the absolute interest in personalty (*o*); and therefore, notwithstanding the apparently indefinite duration of the limitation or trust, is free from objection on the ground of remoteness.

Limitation of
determinable
interests.

There is a well established distinction between (1) a limitation of an absolute estate with a superadded condition determining the estate previously limited before its natural expiration, and (2) the limitation of a qualified or determinable estate. A gift to A. for life, with a proviso that, if he marry, his estate shall cease, is an example of the former; a gift to A. for life or until he marry, of the latter kind of limitation. In the one case A.'s life estate is,

(*l*) 2 Bro. C. C. 214, 217.

(*m*) *Infra*, p. 268, *seq.*

(*n*) *Oddie v. Brown*, 4 De G. & J.
179; 28 L. J. Ch. 542; *Williams v.*

Lewis, 6 H. L. C. 1013, 1024; 28
L. J. Ch. 505.

(*o*) See *supra*, p. 26

upon his marriage, determined by a condition subsequent; Chap. IV.
in the other it ceases by its original constitution (*p*).

A life estate, an estate tail, or an estate for years may, it seems, be made determinable in either way without offending the Rule against Perpetuities, provided the limitation would have been valid, if absolute. Thus a gift of personalty to the unborn child of A. for life, with a proviso that if he marry a Christian, his life interest shall cease, was considered by Hall, V.-C. (*q*), to be valid; and a limitation of real or personal property to the unborn child of A. until marriage, or other event which must happen in his life, would seem to be equally free from objection. So a limitation of real estate to A. for 1000 years or so long as there are issue living of B., or a limitation for 1000 years upon trust to raise a sum of money, with a proviso for cesser upon the money being raised, is valid (*r*). And an estate tail may be determinable either by a qualification embodied in the original limitation, or by a condition subsequent, properly so called. The qualification or condition being in either case (*s*) barrable, there can be no objection on the ground of remoteness. The following instances of determinable or qualified estates tail have been suggested, and appear to be valid:—A limitation to A. and the heirs of his body so long as he or they are lords of the manor of Dale (*t*), or so long as a tree shall stand (*u*), or until A. shall do something (*x*).

Before the statute *Quia Emptores* a fee simple could be created of such a nature as to determine upon the

(*p*) See Co. Lit. 214, (*b*); Butler's note, F. C. R. 12; per Chitty, J., *In re Machu*, 21 Ch. D. 838.

(*q*) *Hodgson v. Halford*, 11 Ch. D. 959; 48 L. J. Ch. 548. The distinction between a life interest determinable by limitation and by condition subsequent does not appear to have been noticed in this case. Possibly a forfeiture clause operating upon the life interest of an unborn person might be held

void for remoteness.

(*r*) Lewis on Perp. 173; Third Report Real Property Comms. p. 43.

(*s*) *Benson v. Hodson*, 1 Mod. 111, and cases cited Shep. Touchst., 8th ed., 40, note (*m*).

(*t*) Butler's note, F. C. R. 12.

(*u*) *Benson v. Hodson*, 1 Mod. 111; F. C. R. 428; Sand. Uses, 5th ed. 159; and per Lord Hatherley, 2 Ap. Ca. 33.

(*x*) *Arton v. Hare*, Poph. 97.

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happening of an event which might happen at any distance of time. Thus a grant to A. and his heirs so long as B. and his heirs shall enjoy the manor of Dale created, before the statute, a fee simple determinable upon B. or his heirs at any time ceasing to enjoy the manor; and upon that event the lands reverted to the grantor or his heirs by way of escheat (*y*). Notwithstanding some authorities to the contrary (*z*), there is little doubt that, since the statute above mentioned, no such determinable fee can be created in tenements within the operation of the statute (*a*).

But a determinable or conditional fee may be created in copyholds not admitting of entail (*b*), annuities (*c*), and other property not within the statute *De donis*. Under a limitation of such property to A. and the heirs of his body, A. takes a fee which, if not alienated, will determine on failure of heirs of his body at any time; and the grantor, his heirs, or assigns, will thereupon become entitled to the fee simple in possession.

But remoteness is often a question of form and not of substance; of expression and not of intention.

But it is, nevertheless, in many cases, the form rather than the substance of a limitation that determines its validity with regard to the Rule against Perpetuities. Thus a limitation to A., if B. shall have no child who attains twenty-three, is void for remoteness, though B. never has a child at all (*d*). A trust annexed to a term, which in order of limitation precedes an estate tail, and

(*y*) Not by way of reversion; 2 Cruise Dig. 4th ed. 335.

(*z*) *Cardigan v. Armitage*, 2 B. & C. 202; *Wellington v. Wellington*, 4 Burr. 2165; *Collier v. McBean*, 34 Beav. 426; 34 L. J. Ch. 555; 35 L. J. Ch. 144; L. R. 1 Ch. 81 (but see, as to this case, *Collier v. Walters*, *infra*); 1 Prest. Est. 431, *seq.*; *ib.* 449; Butler's note, F. C. R. 12; Cruise Dig. 4th ed. 64; Plowd. 557; 1 P. W. 74, 75.

(*a*) See 2 Anders. 138, cited with approval 1 Sand. Us., 5th ed., 209; Third Rep. Real Property Commrs.,

p. 36; *Collier v. Walters*, L. R. 17 Eq. 252; 43 L. J. Ch. 216. See also *In re Machu*, 21 Ch. D. 838; per Cairns, C., L. R. 2 Ap. Ca. 8, 23, 24.

(*b*) *Doe d. Blesard v. Simpson*, 4 Bing. N. C. 333; 3 Man. & Gr. 929; *Doe d. Spencer v. Clarke*, 5 Barn. & Ald. 458.

(*c*) *Earl of Stafford v. Buckley*, 2 Ves. sen. 170.

(*d*) See *Proctor v. Bishop of Bath and Wells*, 2 H. Bl. 358; *infra*, p. 73.

taking effect upon failure of the issue in tail, is void for remoteness, though it is of such a nature that it cannot arise, if the estate tail is barred (*e*). A trust to accumulate rents of settled real estate during the minorities of the persons taking successively under the limitations is void for remoteness. And this is so although the nature of the trust, as regards the accumulated fund, is such, that it is operative only during the minority of the first tenant for life under the settlement, and therefore not beyond the legal period (*f*).

If a limitation is expressed to take effect upon an event which is too remote, and the same event includes another event which is within the line of perpetuity, the limitation is void for remoteness, and cannot take effect although the latter event happens. Thus a limitation to take effect in the event of A., a bachelor, leaving no son who attains twenty-three, or who takes holy orders, is void for remoteness, and not the less so because A. dies childless (*g*). But if the limitation is expressed to take effect if A. leaves no child who attains twenty-two, or upon A.'s death without children then living, it takes effect if A. dies without children living at his death. The question is one of expression, not of intention. It is probable that a gift over, upon no child of A. living to attain twenty-three, is intended to take effect upon the death of A. without having had a child, but that intention not being expressed, a limitation to take effect if no child of A. attains twenty-three is void for remoteness.

Limitation expressed to take effect upon an event that includes two or more events of which the one that happens is not too remote.

Proctor v. Bishop of Bath and Wells.

There is an important exception to the rule just stated where a devise of real estate is expressed to take effect upon an event which includes two contingencies, one of which is such, that, if it happens, the devise will operate by way of remainder, though if the other happens it will

Limitation of real estate capable of taking effect as a remainder or as an executory limitation.

(*e*) See *Sykes v. Sykes*, L. R. 13 Eq. 56; 41 L. J. Ch. 25; see *infra*, p. 153.

16; 3 Jur. N. S. 203; *infra*, p. 156.

(*g*) *Proctor v. Bishop of Bath and Wells*, 2 H. Bl. 358.

(*f*) *Turvin v. Newcombe*, 3 K. & J.

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tation accord-
ing to the
event.

Evers v.
Challis.

operate as an executory limitation. In this case the devise may be "split;" and, if the event so happens, it will take effect as a legal remainder; though, if the alternative event were to happen, it would be void for remoteness. This distinction was established by *Evers v. Challis* (h). The devise there was to A. for life, with remainder to such of her children as, being sons, should attain twenty-three, or, being daughters, should attain twenty-one; and, if no children attained those ages respectively, over. A. died childless. It was held that the gift over took effect as a remainder. The other branch of the limitation, that, namely, intended to operate if A. left a son who afterwards died under twenty-three, was clearly void for remoteness.

In this case, therefore, there is no distinction as regards the validity of the gift between a devise of real estate upon the death of A. without leaving a child who attains twenty-two, and a gift upon the death of A. without leaving a child who attains twenty-two, *or without ever having had a child*. Whether the contingency of dying without having had a child is expressed or not, the gift will, upon the event so happening, take effect as a valid contingent remainder.

The rule in *Evers v. Challis* would seem to apply to the case of a limitation to A. for life, and after his death to such of his children as either before or after his death attain an age beyond twenty-one. If, at A.'s death, all his children had attained the given age, the limitation would take effect as a remainder; otherwise it would seem to be void for remoteness (i).

Limitation ex-
pressed to take
effect upon

Where the limitation is expressed to take effect upon alternative events, one only of which is too remote, it will

(h) 9 H. L. C. 531; 20 L. J. Q. B. 113; 21 L. J. Q. B. 227; 29 L. J. Q. B. 121. This case was decided upon the authority of *Gulliver v. Wickett*, 1 Wils. 105. The opinion expressed in *Fearne's Contingent Remainders*, pp. 396, 397, that the

limitation over in *Gulliver v. Wickett* was an executory devise in both branches, is dissented from by *Cranworth, C.*, in *Evers v. Challis*.

(i) See *In re Lechmere v. Lloyd*, 18 Ch. D. 524; *supra*, p. 41.

nevertheless take effect if the event happens which is not too remote. The remoteness of the alternative limitation does not affect that which must take effect, if at all, within the legal period. "The case of *Longhead v. Phelps* (*k*) shows that where there are two clauses containing a gift over on a particular event, the first being a good gift over on a particular event, and the second being one which would be too remote, and therefore void, advantage may be taken of the former without any notice being taken of the latter clause" (*l*). In *Longhead d. Hopkins v. Phelps* (*m*), the case above mentioned, by a marriage settlement lands were limited to trustees for a term upon certain trusts for daughters of the marriage to take effect (1) in case the husband should die without issue male of his body by the marriage, or (2) in case such issue male should die without issue. The only son of the marriage died in his mother's lifetime. It was held that the trust of the term for the daughters in the event which had happened was good.

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alternative events, of which one is too remote and the other not.

Longhead v. Phelps.

In *Dungannon v. Smith* (*n*) there was a bequest of leaseholds upon certain trusts until an heir male of the body of A. should attain twenty-one, and then upon trust to assign the same to such heir male. It was held void for remoteness, even in the case of an heir who had attained twenty-one at A.'s death. But it was expressly stated by Rolfe, B. (*o*), in his opinion to the House of Lords, that although the objects of the trust would have been precisely the same if the testator had "in terms directed his trustees to assign to the person who at the death of A. should be heir male of his body, if such person should attain his age of twenty-one, and, if not, then to the first subsequent heir male who should attain twenty-one, there is no doubt that such a gift would be good as to the person who should be heir male of A. at his death."

(*k*) 2 W. Bl. 703.

(*m*) 2 W. Bl. 703.

(*l*) Per Lord St. Leonards, *Money-penny v. Dering*, 2 D. M. & G. 145, 180, 181.

(*n*) 12 Cl. & F. 546; 10 Jur. O. S. 721; see *infra*, p. 113.

(*o*) P. 574.

Chap. IV. In *Monypenny v. Dering* (p) the devise was in trust
Monypenny v. Dering. for the testator's brother, A., for life, with remainder to A.'s first unborn son for life, with remainder to the first son of such unborn son in tail; with similar remainders for life and in tail to A.'s second and other sons, and their sons respectively; "and in default of issue of the body of my said brother A., or in case of his not leaving any at his decease," upon trust for B. A. died without having had any children. It was held that the gift to B. was valid. "The Courts," said Lord St. Leonards (q), "have gone at least to this extent, that they will not hold a gift over made in words comprising one event as made on two events, although in point of fact it may consist very reasonably of two branches, unless the testator has so expressed it. What is contended in the case before me is, that I am to consider the words which, at all events, point to different events, as pointing to one event. There is no doubt that, in the sense in which the words 'and in default of issue of the body' are generally used, they mean a failure of issue at any time, which would, of course, embrace a failure of issue at any particular time; but then I find the testator, while using these words, also using words which embrace an event falling within them. I am therefore bound to consider that he did not use the general words in the sense in which the Court would use them; for, if he did, the other clause would be insensible and inoperative. As, then, I have before refused to add to the words which he has used, so I refuse, on the same solid grounds, as it seems to me, to strike out his words, and I feel myself bound to give effect to every word in the will, as far as the law will enable me to do so."

So there are several cases (r) where a limitation to take

(p) 2 D. M. & G. 145; and see S. C. 7 Ha. 568; 16 M. & W. 418; 17 L. J. Ex. 81; 20 L. J. Ch. 153; 22 L. J. Ch. 313.

(q) P. 183.

(r) *Minter v. Wraith*, 13 Sim. 52; *Goring v. Howard*, 16 Sim. 395; 18 L. J. Ch. 105; *Cambridge v. Rous*, 25 Beav. 409; and see *Leake v. Robinson*, 2 Mer. 363, where, how-

effect in case A., a living person, dies without children living at his death, and following a limitation (which is void for remoteness) to such of A.'s children as attain an age beyond twenty-one, has been held valid.

In *Miles v. Harford* (s) in a strict settlement of real estate there was a shifting clause expressed to operate if any younger sons of the testator, or any issue male of the body of such younger son, should become entitled under the will to the settled estates, and if any other younger son or any issue of such other younger son should be then living. It was held by Jessel, M.R., that the clause was not void for remoteness, and that it took effect upon a son become entitled to the settled estates (t). *Miles v. Harford.*

In *Grey v. Montagu* (u) there was a bequest to living persons of a sum of money upon the death of A. without issue, or in case he should not dispose of it by will or deed. A. died without issue and without having disposed of it by will or deed. It was held that the gift over on A.'s death did not take effect; apparently on the ground that a gift over on failure of his issue was void for remoteness. It does not appear to have been suggested that the gift over in the alternative event—of A. not having disposed of the money by will or deed—could take effect. If A. took a mere power to dispose of the money after his death, there seems no reason why the gift over should not have taken effect as in default of exercise of the power (v); though, if there was a prior absolute gift to A., the gift over was void for repugnance (x).

It is not clear whether a covenant by an owner in fee, for himself his heirs and assigns, that the covenantee, his

ever, the gift was void because of remoteness in the objects as well as in the event.

(s) 12 Ch. D. 691; 41 L. T. N. S. 378.

(t) *Quære* whether it would not also have taken effect if issue of a son had become entitled in the life-

time of another son.

(u) 3 B. P. C. 314; 2 Ed. 205.

(v) See *In re Stringer's Estate*, *Shaw v. Jones Ford*, 6 Ch. D. 1; 46 L. J. Ch. 633.

(x) See *In re Wilcock's Settlement*, 1 Ch. D. 229; 45 L. J. Ch. 163.

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heirs and assigns, shall have a right of pre-emption over the land, is void for remoteness altogether, or whether it is valid and binds the land during the life of the covenantor and whilst it remains in his hands, though void for remoteness as to the rest. In *Stocker v. Dean* (*y*) a covenant of this kind was enforced against the covenantor; but the covenant was there construed as not extending beyond the life of the covenantor. In *London and South Western Railway Co. v. Gomm* (*z*), where the covenant was not limited in point of time, it was held to be void for remoteness altogether; though upon the facts it was not necessary to decide as to the validity of the covenant as against the lands in the hands of the covenantor.

The opinion expressed in the Third Report of the Real Property Commissioners (pp. 41, 42), that "if an executory be limited to take effect, either in case A. shall die in the lifetime of B., or in case there shall be an indefinite failure of issue of C., the whole will be void," appears to be incorrect. The cases above cited show that the limitation "in case A. shall die in the lifetime of B." is perfectly good, and will take effect, if the event so happens.

A limitation taking effect upon alternative events, of which one is too remote and the other not, must be distinguished from a limitation ulterior to and dependent upon a prior limitation that is too remote. The former will take effect or fail for remoteness, according to the event; the latter cannot take effect under any circumstances (*a*).

It has not been decided whether a gift, subsequent in order of limitation to another that is too remote, but expressed to take effect in case of the prior limitation being void for remoteness, would be valid. There seems reason to think that it would (*b*).

(*y*) 16 Beav. 161.

(*z*) 20 Ch. D. 562; 51 L. J. Ch. 193, 530.

(*a*) See *infra*, p. 288.

(*b*) See per Hall, V.-C., 19 Ch. D. 526.

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The rule which requires the several events upon which a limitation is intended to take effect to be expressed separately, where any one of them may occur beyond the legal period, does not apply to a clause affecting separate and distinct limitations or interests, as to some, but not all, of which its operation would be too remote. Such a clause will be valid, and will take effect in those cases where it cannot operate remotely, though as to the others it is void for remoteness.

Single clause affecting two or more limitations, as to some (but not all) of which it is too remote.

In *Cromek v. Lumb* (c) a gift over, applicable to all the shares of all the members of two classes of legatees, was held valid as to shares belonging to one of the classes and void for remoteness as to shares belonging to the other class. The former class consisted of grandchildren being children of a deceased child of the testator, and the latter of grandchildren being children of children of the testator who were living at his death.

Arnold v. Congreve (d) is a very similar case, the clause in question there being a direction to settle legacies given to grandchildren, one only of whom was living at the testatrix' death.

A. had power to appoint a fund amongst all the children begotten and to be begotten of B., and their issue; and, in default of appointment, the fund was given to the children of B. equally. B. had only six children, all of whom were living when the power was created. A. by his will directed that the share to which every child of B. begotten or to be begotten was entitled in default of appointment should be held in trust for that child for life, and, after its death, for its children. It was held that the appointment was not void for remoteness (e). Sir L. Shadwell held that the appointment was not of the fund in bulk to a set of persons collectively, some of whom were within the line

(c) 2 Y. & C. C. C. 565.

(e) *Griffith v. Pownall*, 13 Sim.

(d) 1 Russ. & M. 209, *infra*, 393.

p. 97.

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of perpetuity and others were not. The appointor "merely directed how the share of each daughter should go after her death. If there had been a seventh or an eighth daughter the appointment would have been bad as to their children. But nevertheless the appointment as to the share of C. (one of B.'s children) would have been good; for the partial invalidity of the appointment with regard to the share of her younger sisters could not affect in the slightest degree the validity of the appointment of her share."

In *Peard v. Kekenich* (*f*) a testator with power to appoint to his children appointed to his eldest son, A., with a gift over to other sons if A. should die under twenty-one. And he directed the rents to be accumulated until A. or the other sons should attain twenty-three, and then to be paid over. It was held by Romilly, M.R., that the direction to accumulate was not void for remoteness in the case of A., who was three years old at the creation of the power. As to the other sons no question arose, and no opinion was expressed.

In a recent case (*g*) a restraint upon anticipation was annexed to a limitation to a class, as to some of the members of which its operation would have been too remote. It was held that, although void as to these members, the clause took effect upon the shares of the others. The fund was settled during the joint lives of the parents upon trust, after the death of the survivor of them, for all their children; and, as to daughters, for their separate use without power of anticipation. It was held by Hall, V.-C., following the decision of Wood, V.-C., in *Wilson v. Wilson* (*h*), that the restraint upon anticipation took effect as to two daughters living at the date of the settlement.

(*f*) 15 Beav. 166; 21 L. J. Ch. 610; 49 L. J. Ch. 620.
456.

(*h*) 28 L. J. Ch. 95; 4 Jur. N. S.
(*g*) *Herbert v. Webster*, 15 Ch. D. 1076; *infra*, p. 97.

In *Harding v. Nott* (i) the principle was recognised by Lord Campbell; but there the limitation which, according to the event, was applicable, was void for remoteness. Leaseholds were bequeathed to A., subject to an executory gift over in the event of "B. or the issue male of his body" becoming entitled to certain lands under the will of C. By that will the lands were limited upon the failure or determination of prior estates tail to B. for life, with remainders in tail to his first and other sons. A son of B. became entitled under the will of C. It was held that the gift over of the leaseholds, in the event which had happened, was void for remoteness; but it was admitted by Lord Campbell that, if B. had become entitled under C.'s will, the case might have been different.

And in a recent case, before Jessel, M.R., it was held that the distinction existed:—

To a gift by will of leaseholds there was added a shifting clause expressed to take effect if A., the donee, or any of his male issue, should acquire certain other estates. It was held that the shifting clause carried over the leaseholds upon A. acquiring the other estates, although as to his issue it was void for remoteness (k).

In *Hodgson v. Harford* (l) a testatrix having a power of appointment amongst her children appointed part of the fund by will to two daughters for life, with remainders over, and the residue to her other children absolutely. By a subsequent clause she directed that if any child married a Christian in her lifetime or after her death, such child's share should be forfeited and go over to the other children then living. It was held that the forfeiture clause took

(i) 7 E. & B. 650; 26 L. J. Q. B. 244.

(k) *Miles v. Harford*, 12 Ch. D. 691; 41 L. T. N. S. 378; see also *Stark v. Dakyns*, L. R. 15 Eq. 307; L. R. 10 Ch. 35; 42 L. J. Ch. 524; 44 L. J. Ch. 205. It may be doubted whether the gift over of the lease-

holds in *Miles v. Harford* was void for remoteness in the event of issue of A. acquiring the other estates in the lifetime of a younger son of the testator.

(l) 11 Ch. D. 959; 48 L. J. Ch. 548.

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effect in the case of one of the children, a son born after the creation of the power, who married a Christian in the testatrix' lifetime; and that, in the case of another child, one of the two daughters who was born after the creation of the power, and who married a Christian after the testatrix' death, it was void for remoteness.

In this case it was argued that the appointment to the daughter was, in effect, an appointment to her for life, or until marriage with a Christian, and that since a life interest could be well limited to her, a life interest determinable as aforesaid was not less valid. But it was held that the forfeiture clause being "one single clause, applicable to a number of things—not merely to life interests but to the capital of the various shares appointed"—could not be split; that it could not be construed apart from the gift over; and that, being void for remoteness in the case of a share appointed absolutely to a child who married after the appointor's death, it was also void in the case of a share appointed for life, and could not take effect as a clause of cesser upon the life interest. If it had been possible to construe the forfeiture clause apart from the gift over, Hall, V.-C., seems to have considered that it would have taken effect upon the life interest. But this seems doubtful (*m*).

From these cases it is clear that a single clause applicable to and affecting the several shares of the members of a class to which property has been previously limited absolutely may be valid as to some of the shares, and void for remoteness as to the others. *A fortiori* a single clause (not being a class limitation) limiting distinct interests to two or more persons by a common description is not altogether void merely because, as to some of the objects, it is too remote. Thus in *Storrs v. Benbow* (*n*) a gift of £500 to each of the

(*m*) See 1 Jarm. on Wills, 4th ed., 870, note *γ*; and *Hurst v. Hurst*, 21 Ch. D. 278.

(*n*) 3 D. M. & G. 390; 22 L. J. Ch. 823.

children (present and future) of each of the testator's nephews and nieces (present and future) was held valid as to children of nephews and nieces born in the testator's life, though void for remoteness as to the others (o).

In the case of class limitations, and limitations of the same property to two or more persons successively answering a common description, the rule is different. Here, as will appear elsewhere (p), the rule is that the limitation is void altogether, as to every member of the class and every one of the series of persons described by the common description, if by possibility it may be too remote as to any one of them.

Different rule in class limitations.

A settlement of personal property by reference to limitations of settled real estate, as, for example, a direction to trustees to pay income of personalty to the persons for the time being entitled to the rents of the realty under the settlement, is not void for remoteness. It is construed, not as a trust for a series of persons, some of whom may be too remote, successively for life, but as a limitation to the first tenant in tail of the realty absolutely, subject to the life interests of the preceding tenants for life (q). Limitations of this character are fully considered below (r).

Limitation of personalty by reference to limitations of settled realty.

(o) See also *Wilkinson v. Duncan*, 30 Beav. 111; 26 L. J. Ch. 495; and other cases *infra*, p. 282, *seq.*
 (q) *In re Johnson's Trusts*, L. R. 2 Eq. 716; 12 Jur. N. S. 616.
 (r) pp. 124-135.

(p) *Infra*, p. 84.

CHAPTER V.

LIMITATIONS TO CLASSES.

Chap. V. THE Rule against Perpetuities has a singular operation in

Application of
the Rule
against Per-
petuities to
class limita-
tions.

Class limita-
tion defined.

Two kinds of
class limita-
tions.

the case of class limitations. "The Rule is that the vice of remoteness affects the class as a whole, if it may affect an unascertained number of its members" (a). In other words, a limitation to a class is void altogether, if it is, or by possibility may be, too remote as to any member of the class. It is therefore material to determine what is a limitation or gift to a class. In a recent case a class gift was thus defined by Lord Selborne (b):—"A gift is said to be to a class of persons, when it is to all those who shall come within a certain category or description defined by a general or collective formula, and who, if they take at all, are to take one divisible subject in certain proportionate shares" (c).

Besides the class limitation here spoken of, where all the members of the class take concurrently, and take the subject matter of limitation in aliquot shares, there is another kind of limitation sometimes described as a class limitation, but of an entirely different character. The limitation in *Ker v. Lord Dungannon* (d)—to the heir male of the body of A., for the time being, for life, until an heir male

(a) See *Pearks v. Moseley*, 5 Ap. Ca. 714, 723; 50 L. J. Ch. 57.

(b) *Pearks v. Moseley*, 5 Ap. Ca. 714, 723; 50 L. J. Ch. 57.

(c) As to whether a gift to A. and

a class is a class gift, see *infra*, p. 101.

(d) 1 Dr. & War. 509; on app. nom. *Dungannon v. Smith*, 12 Cl. & F. 546; 10 Jur. O. S. 721.

attains twenty-one, and then to such heir male absolutely — is a class limitation of the latter kind. Of this limitation Sir E. Sugden said: "It is quite as much a gift to a class, though the persons within the class are to take successively, and finally only one of them absolutely, and not jointly and together," as those where the class take the absolute interests concurrently (e). Chap. V.

It will, however, be convenient to consider the operation of the Rule against Perpetuities upon these two kinds of class limitations separately. The limitations discussed in this chapter are class limitations of the kind first described, where the members of the class take the absolute interest in the property which is the subject of limitation concurrently in aliquot shares. Limitations such as that in *Ker v. Lord Dungannon* are considered in the following chapter (f).

The leading case with reference to remoteness in class limitations is *Leake v. Robinson* (g). In that case the testator bequeathed personal property to trustees in trust for his grandson A. for life, and, after his death, in trust for the children of A. who should attain twenty-five or marry under that age; and if A. should leave no children living at his death, or such children should all die under twenty-five, or, being daughters, before marriage, then in trust for the brothers and sisters of A. who should attain twenty-five, or, being sisters, marry under that age. A. died childless, leaving six brothers and sisters, one of whom was born after the testator's death. Sir W. Grant held that the gift to A.'s brothers and sisters was void for remoteness. It was contended that the gift was valid as to such of the brothers and sisters as were born before the testator's death; as if the gift had been to individuals, of whom some were capable of taking, and others not. In answer to this conten-

Limitation to class not necessarily ascertained within the legal period is altogether void.

Leake v. Robinson.

(e) See also per Wood, V.-C., in *Catlin v. Brown*, 11 Ha. 372, 376; 1 W. R. 533; and per Chelmsford, C., *Christie v. Gosling*, L. R. 1 H. L. 279, 290.
 (f) *Infra*, p. 112.
 (g) 2 Mer. 363.

Chap. V. tion Sir W. Grant said: "The bequests in question are not made to individuals, but to classes; and what I have to determine is, whether the class can take. I must make a new will for the testator if I split into portions his general bequest to the class, and say that, because the rule of law forbids his intention from operating in favour of the whole class, I will make his bequests what he never intended them to be, namely, a series of particular legacies to particular individuals; or, what he had as little in his contemplation, distinct bequests in each instance to two different classes, namely, to grandchildren living at his death and to grandchildren born after his death."

The principle of *Leake v. Robinson* has been recognised and followed in many subsequent cases. It applies, not only where the limitation is to what may be called a natural class, as "the children of A.," or "the brothers and sisters of A.," but wherever the limitation is to a number of persons or to two or more groups of persons who for the purpose of the limitation form one class within the meaning of that term as defined by Lord Selborne in *Pearks v. Moseley*.

Thus where the gift was, in trust for such of A.'s children as should attain twenty-one, and also such children of any son of A. dying under twenty-one as should attain twenty-one, *per stirpes*, the limitation was held void for remoteness (*h*). In this case Lord Romilly, M.R., said: "If a man gives an estate or a sum of money to all the children of A. and all the grandchildren of B., to be divided between them in equal shares and proportions, and both A. and B. survive the testator, I have very little doubt that such a gift would be void for remoteness; for the class, which consists of the children of A. and the grandchildren of B., cannot be ascertained until the grandchildren of B. are ascertained, and that will be at a period too remote."

(*h*) *Seaman v. Wood*, 22 Beav. 591, 594.

It sometimes happens that, although the actual number of members of the class is not necessarily ascertainable within the legal period, the maximum number of the members, and therefore the minimum amount of each share, is ascertainable within that period. This does not enable the limitation to take effect. A gift by will to the testator's grandchildren who attains twenty-two is void for remoteness altogether, and notwithstanding the fact that the minimum amount of each grandchild's share is necessarily ascertained at the expiration of a life in being, that is to say, at the death of the survivor of the testator's children. It is necessary for the validity of the gift that every member of the class should be ascertained within the legal period. It cannot take effect partially, or by instalments, so as to be valid as to that minimum amount, or share, to which every grandchild attaining twenty-two must, at all events, be entitled, and void for remoteness as to anything accruing by survivorship.

Thus in *Pearks v. Moseley* (i) the gift was, to the children of A. attaining twenty-one and the issue attaining twenty-one of such of them as should die under twenty-one, *per stirpes*. It was held that the whole gift was void for remoteness. The facts were as follows. A. had three children, of whom two died under twenty-one without issue. The third attained twenty-one. It was held that, the gift being altogether void, the third child took no part of the fund bequeathed.

The principle of the rule applied in *Pearks v. Moseley* is very clearly stated by Jessel, M.R., in *Hale v. Hale* (k). There the testator gave his real and personal estate to trustees upon trust for his widow during widowhood, and upon her death or marriage for his children then living and the issue of any child then dead, such issue to take their

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And cannot take effect even as to shares and members ascertainable within the legal period.

Limitation to such of a class of competent objects as are living at a remote period and the issue, to be then ascertained, of such of them as are then dead.

Pearks v. Moseley.

Hale v. Hale.

(i) 5 Ap. Ca. 714; 50 L. J. Ch. 57; *Seaman v. Wood*, *supra*, p. 86, is a very similar case. (k) 3 Ch. D. 643; 24 W. R. 1065.

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parents' share equally ; the shares of children and grandchildren, being males, to be vested at twenty-four, and, in the case of females, to be settled as in the will mentioned. The testator's wife survived him ; all his children but one daughter had attained twenty-four at his death. The whole of the gift after the life interest to the widow was held void for remoteness. The following is an extract from the judgment of the Master of the Rolls:—"No human being could tell at the death of the testator how many of the testator's children would die in the lifetime or before the second marriage of the widow, nor whether any such child so dying would leave sons or not, and, if the child so dying left sons, whether or not they would attain the age of twenty-four years. The result might be that a child might die in the lifetime of the widow, or before her second marriage, leaving a son under the age of one year ; the widow might then die, or marry, and such son might not attain twenty-one within the legal period ; and consequently you could not within that period ascertain the class to take, for that is the important point. The class you could ascertain in one sense ; you could say that at the death of the widow the class could not exceed a given number, that is to say, it could not exceed all the children then living and all those who died in her lifetime leaving children ; and you could say at the testator's decease that in no case could the whole class to take exceed the whole number of the testator's children, because grandchildren would only come in the place of children. In that sense the class is ascertainable ; but in the other sense it is not. You could not tell how few there would be to take. You might have a division according to the number of children ; then a child might die leaving a son who might attain twenty-four after the legal period, and then that share ought to come back to the others, if you could divide it ; but you could not. It must remain absolutely uncertain what share each child

would take, until it was ascertained whether the grandchildren attained twenty-four or not. The shares were not necessarily ascertainable at the death of the tenant for life, for you could not find out what share each child would take, although you could find out that each child must at least have a certain share. That being the state of the law, could you sever the shares? that is, could you say, I will give to each child his minimum share, and only declare so much to be void for remoteness as he may possibly take beyond the legal period? There again you would have to wait for the period of distribution to find out the share, unless you took the minimum share to be determined by the number of shares at the testator's death; in which case you would have a minimum share, in the sense that a son who had then attained twenty-four must take that amount, at all events, although he might be entitled to more. As I understand it, *Leake v. Robinson* (l), and the whole of that class of cases, negative the possibility of doing so. You must ascertain the whole share in order to get out of the decisions. According to the other mode of dealing, the minimum share might be given to each child who answered the description at the testator's death, leaving the law as to remoteness to take effect as regards the difference between the maximum and the minimum share; but that is not the rule laid down by this Court, which has held the whole gift void unless you can ascertain the shares within the period." The Master of the Rolls proceeds to cite *Smith v. Smith* (m), *Leake v. Robinson* (n), and *Seaman v. Wood* (o), as conclusive of the law on the subject.

The decision of Malins, V.-C., in *In re Moseley's Trusts* (p), which is opposed to *Hale v. Hale*, and was dissented from by Jessel, M.R., in that case, cannot be

(l) 2 Mer. 363, *supra*, p. 85.

(o) 22 Beav. 591.

(m) L. R. 5 Ch. 342, *infra*, p. 92.

(p) L. R. 11 Eq. 499; 40 L. J. Ch. 275.

(n) 2 Mer. 363, *supra*, p. 85.

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supported since the decision of the House of Lords in *Pearks v. Moseley* (q). The last mentioned case was, in fact, a decision upon the same words in the same will, though with reference to a different fund. In it the House of Lords followed with approbation the decision and reasoning of Jessel, M.R., in *Hale v. Hale*; and removed the doubts as to the correctness of the decisions in *Smith v. Smith* (r) and *Hale v. Hale* which had been raised by dicta of the members of the Court of Appeal when affirming, with expressions of reluctance, the decision by Jessel, M.R., of *In re Moseley's Trusts* (No. 2) in accordance with those cases (s).

In *Blight v. Hartnoll* (t) the testatrix directed the surplus rents of a freehold wharf, after satisfying certain annuities by her will given to living persons, to be accumulated for the purpose of paying off mortgages subsisting on the property; and she directed her executors, after payment of the annuities and of the mortgage debts, to sell the wharf and divide the proceeds amongst such of her grandchildren as should be then surviving in such proportions as her (the testatrix') sister should by will appoint. It was held that the objects of the power of appointment were grandchildren living when the annuities and mortgages were paid off and satisfied—a class not ascertainable within the legal period—and that the entire gift to grandchildren was void for remoteness (u). “The Rule against Perpetuities requires, in my view, the ascertainment within the period, not merely of the extreme limits of the class of persons who may take, but of the very persons who are to take, and that because the Rule is aimed at the practical object of telling who can deal with the property; and if

(q) And the doubt expressed by Romilly, M.R., in *Salmon v. Salmon*, 29 Beav. 27, is removed.

(r) *Infra*, p. 92.

(s) See 11 Ch. D. 555, 558, 559.

(t) 19 Ch. D. 294; 49 L. J. Ch.

255.

(u) There was an appointment by the sister which was held void, as having been made before the class of objects was ascertained: *sed quære*.

you cannot tell who are entitled to the property, but only who may become entitled to the property, the property is practically tied up.” Chap. V.

In *Bentinck v. Duke of Portland* (x) the bequest was to such of the testatrix' four nephews and nieces (by name) as should be living twelve months after the death of A. “and the issue then living and who shall attain the age of twenty-one years or marry” of any of the four who should then be dead, *per stirpes*. It was held by Fry, J., that the gift was to a class (of nephews and nieces and their issue), and that, being too remote as to the issue, the whole failed. *Bentinck v. Duke of Portland.*

In *Bentinck v. Duke of Portland*, Fry, J., drew the distinction between the class of cases represented by *Pearks v. Moseley* and that represented by *Cattlin v. Brown* (*infra*, p. 285)—“a fine distinction between a gift of separate shares, together with an interest in other shares, which interest might be void for violating the Rule against Perpetuities, on the one hand; and, on the other hand, of a share whose smallest amount may be ascertained within the lawful period, but whose maximum amount can only be ascertained beyond the period.” It will be seen below (y) that in the former case the gift of the original share is valid, and that the subsequent gift, which is void for remoteness, of an interest in other shares, does affect the gift of the original share. In the latter case—that of *Pearks v. Moseley* and *Hale v. Hale*—the whole is void for remoteness.

In *Merlin v. Blagrove* (z) the testator devised his estates to trustees in trust, after A.'s death, in case A. should have only one child which should survive her, to pay £200 a year for the maintenance of such child until he should attain twenty-five; and from and after he should attain twenty-five, to raise and pay him £10,000; or, in case A.

(x) 7 Ch. D. 693; 47 L. J. Ch. 235.

(y) p. 95.
(z) 25 Beav. 125.

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should have two or more children at her death, to raise an annual sum for their maintenance until they should respectively attain twenty-five, and when they respectively attained twenty-five to pay each an equal share of the £10,000. A. had one child only, who was begotten, but not born, at the testator's death. The gift of the £10,000 was held to be void for remoteness. It was, in effect, a gift of a sum, to be raised on a remote event, to a class to be ascertained upon a remote event.

Limitation to a class consisting of two sub-classes, the members of one of the sub-classes being substitutes for members of the other.

A class sometimes consists of two groups or sub-classes, the members of one taking by way of substitution for members of the other in case of the death of the latter before the period of distribution, but not under a separate and substantive limitation. In this case the whole gift fails unless all the members of both groups are capable of being ascertained within the legal period. The gifts in *Hale v. Hale*, *Pearks v. Moseley*, and *Bentinck v. Duke of Portland*, above mentioned, were of this character.

So also in *Smith v. Smith (a)* the gift was after the death of the testator's wife "unto and equally between and among all such children of mine then living and such issue then living of my child or children then deceased as shall, either before or after the death of my said wife, attain the age of twenty-three years, as tenants in common, in course of distribution according to the stocks and not to the number of individual objects, and so that deceased children may take, by way of substitution, the share or respective shares only which the parent or respective parents would, if living, have taken." It was held that there was one gift only, and that to a class of children and grandchildren; and that, the latter being too remote, the whole was void for remoteness.

Again, in *In re Merrick's Trusts (b)* the gift was in remainder after the death of the survivor of A., a spinster, and her husband, to such of the testator's brothers and

(a) L. R. 5 Ch. 342.

(b) L. R. 1 Eq. 551.

sisters (by name) as should then be living "or the lawful issue of such of them as shall be then dead." It was treated by the Court, and in argument, as clear, that if "issue" meant issue living at the death of the survivor of A. and her husband (who might be a person unborn at the testator's death), the gift was void for remoteness.

In *Stuart v. Cockerell* (c) personal estate was given by will to S., a bachelor, for life; remainder to the eldest son of S. for life; remainder to E. for life; and after the deaths of S., his eldest son, and E., upon trust to transfer the same "to all and every the children of S., share and share alike, and the children of such of the children of S. as shall be then dead, according to the Statute of Distributions; but, in case there shall be no child or grandchild of S. then living, upon trust to transfer the same to the children of E." It was held by the Lords Justices, affirming the decision of Malins, V.-C., that the gift to the children and grandchildren of S. was void for remoteness. In this case the gift over in default of children living at the period of distribution was relied on as distinguishing the case from *In re Bennett's Trusts* (d) and *Baldwin v. Rogers* (e). In these cases the limitation, which was somewhat similar to that in *Stuart v. Cockerell*, was held to have a double operation. It was a gift to a primary class, with a separate and independent gift over to a secondary class, by way of substitution, of the shares of members of the primary class who should die before the period of distribution.

In *Baldwin v. Rogers* (f) the gift over was clearly valid, and, as to it, no question of remoteness arose. The case, however, is frequently referred to in connection with the subject under discussion, and it will be convenient to state it more fully. The testator there gave his residuary estate upon trust for his wife for life, with remainders to his

(c) L. R. 7 Eq. 363; *ib.*, 5 Ch. 713; 39 L. J. Ch. 729.

(d) 3 K. & J. 280.

(e) 3 D. M. & G. 649; 22 L. J. Ch. 665.

(f) *Ubi supra*.

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The difficulty of this class of cases is to distinguish between those cases where the limitation is single, to a single class including members who are too remote, from those where the limitation consists of two branches, (1) a gift is to a class of persons competent to take, and (2) a separate and distinct gift over of the shares so given, which gift over is void for remoteness. In *In re Moseley's Trusts* (g) (*Pearks v. Moseley*, *supra*, p. 87), Malins, V.-C., considered the gift to be of the character last described; whereas it was held by the House of Lords to be a gift to one class of children and issue, the issue being too remote. In *Packer v. Scott* (h) a gift to children "and" their too remote issue was held valid, and not too remote, by reason of a context which was held to point to the attainment of twenty-one by one of the children as the time for ascertaining the class.

In the class of cases represented by *Pearks v. Moseley*, the property which is the subject of limitation is divisible into aliquot parts corresponding in number with those members of the class who are competent objects. The amount of these parts or shares is ascertainable within the legal period. The vice of remoteness is only introduced by that part of the limitation which requires a possible sub-division of some of those shares amongst sub-classes

(g) L. R. 11 Eq. 499; 40 L. J. Ch. 270.

(h) 33 Beav. 511, *infra*.

which are not necessarily ascertainable within the legal period. The members of the sub-classes, though not taking equal shares with the members of the original class, are for the purpose of the Rule against Perpetuities members of that class. If the sub-classes are not ascertainable within the legal period the whole gift fails.

Though a gift to a class of children, competent, and issue, incompetent, is void for remoteness, a limitation to a class of competent objects is not affected by a separate and distinct gift over, which is void for remoteness, of some or all the shares.

Limitation to a class of competent objects not affected by a separate and distinct gift over of the several shares, which is void for remoteness.

In *Ring v. Hardwicke* (i) an absolute gift to the testator's daughters was followed by a direction to settle their shares, with a gift over of the shares of such of them as should die without leaving issue who should attain twenty-five. It was held that the gift to the daughters was not affected by the gift over, which was void for remoteness.

Ring v. Hardwicke.

In *Taylor v. Frobisher* (k) the bequest was to the children of A. "to be a vested interest" on each attaining thirty; with a gift over of the shares of those dying under thirty to the survivors. It was held that, notwithstanding the words as to vesting at thirty, the children took absolute interests which vested at birth, and, by reason of the gift over being void for remoteness, were indefeasible.

In *Courtier v. Oram* (l) the testator bequeathed the income of his residuary estate between his three children, and when any child died his share was to be equally divided amongst the testator's surviving grandchildren; and if any of the grandchildren died, their share was to be divided amongst the other grandchildren then living. The gift to the grandchildren living at the death of a child was held valid and absolute; the gift over upon the death of a grandchild being void for remoteness.

(i) 2 Beav. 352; 4 Jur. O. S. 242. Ch. 605.

(k) 5 De G. & Sm. 191; 21 L. J. (l) 21 Beav. 91.

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*Goodier v.
Johnson.*

In *Goodier v. Johnson* (m) the gift was upon trust, after the death of the longest liver of the testator's daughter, unmarried son, and son's widow "to pay and apply the money to be raised (by a sale) as aforesaid unto and equally amongst all the children of my said son A. and daughter B., share and share alike, and the lawful issue of such of them as may then be dead leaving issue, such issue to be entitled to no more than their parent or respective parents would have been if living." It was held that the gift was not to a class of children and issue; that under the first words of the trust all the children took absolutely; that the gift to issue was substitutionary; and, the gift to issue being too remote, the children took absolute and indefeasible interests.

Packer v. Scott (n) seems to belong to this class of cases. The bequest there was, in effect, upon trust, when and as the children of A. (a living person) should severally attain twenty-one, to pay and divide a sum equally between them and the children of such of them as should die under twenty-one; but so that the children of a deceased child should, on their severally attaining twenty-one, take their parent's share. It was held that the gift was not void for remoteness; the class being ascertained when a child of A. attained twenty-one; the gift over to children attaining twenty-one of a deceased child not affecting the validity of the primary gift.

Nor is an absolute gift to a class of competent objects defeasible by a gift over upon the death of all the class under an age which a member of the class may not attain within the legal period. In *Hardcastle v. Hardcastle* (o) the gift was to the present and future great grandchildren of the testator, being children of his granddaughter A., with a gift over upon the death of all of them under

(m) 18 Ch. D. 441; 51 L. J. Ch. 369.

(n) 33 Beav. 511.

(o) 1 H. & M. 405; 7 L. T. N. S. 503.

twenty-five without issue. The gift to the great-grandchildren was held valid, and the gift over rejected as too remote.

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So where there is a valid limitation to a class, absolute in the first instance, and there is superadded a clause, which is too remote, modifying or restricting the absolute interest previously limited, the modifying clause is rejected, and the class takes absolutely. Thus in *Wilson v. Wilson* (p) there was a gift to the present and future children of A. who should be living at the death of B., and there followed a direction to settle the shares of such of the children as were daughters upon the daughters for life, with remainder to their children. The gift to the children of A. was held valid, and the direction to settle daughters' shares was, in the case of daughters born after the testator's death, rejected for remoteness (q).

Limitation to a class of competent objects not affected by a superadded condition or modifying clause which is void for remoteness.
Wilson v. Wilson.

In *Arnold v. Congreve* (r) the testatrix gave £6000 to her son for life, remainder, as to one moiety, to his eldest male child living at her death, and, as to the other moiety, to his other children. She gave other sums to all her children for life, with remainders to their children. By a codicil she directed that her grandchildren's shares should be settled on them for life, with remainders to their children. It was held that the codicil operated upon the share of the eldest male child of the son living at the testatrix' death, but was void for remoteness as to the other grandchildren.

A superadded condition or restriction annexed to a class gift must be distinguished from a clause which forms part of the description of the class. In *Pearks v. Moseley* (s) the trust was for "all the children of my said daughter who shall attain the age of twenty-one years and the lawful

(p) 28 L. J. Ch. 95; 4 Jur. N. S. 1076.

610; 49 L. J. Ch. 620.

(r) 1 Rus. & M. 209.

(q) It was held valid as to daughters born in the testator's life; and see *Herbert v. Webster*, 15 Ch. D.

(s) 5 Ap. Ca. 714; 50 L. J. Ch. 57.

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issue of such of them as shall die under that age leaving lawful issue at his her or their decease or respective deceases, which issue shall afterwards attain the age of twenty-one years or die under that age leaving issue at his her or their decease or deceases respectively as tenants in common, if more than one; but such issue to take only the share or shares which his her or their parent or parents respectively would have taken if living." It was held that the whole of this was descriptive of the class and equivalent to "all the children of my said daughter who shall attain the age of twenty-one years and the issue who shall live to attain that age of such of them as shall die in minority." It was contended unsuccessfully that the words "which issue shall afterwards attain twenty-one" were words not descriptive of the class, but of defeasance importing a condition subsequent.

Difficulty of distinguishing words descriptive of the class from words importing a condition subsequent or limitation over. Limitation to a class of competent objects to vest at a remote period.

The difficulty of distinguishing words descriptive of the class from words operating as a separate and substantive limitation over is shown by comparing such cases as *Pearks v. Moseley* and *Stuart v. Cockerell* with *Goodier v. Johnson*, *Baldwin v. Rogers*, or *Packer v. Scott* (t).

A gift to a class of competent objects fails for remoteness if the shares are not to vest before the members of the class attain an age which as to some of them may be too remote. And this is the case, not only where the gift is to such of the class as attain the specified age, but also where it is, in the first instance, to the class absolutely, and there follows a separate clause directing shares to vest at the given age. Thus in *Cromek v. Lumb* (u) the gift was to the testator's present and future grandchildren. In a subsequent part of the will was a proviso applicable to this and other gifts that legacies and shares given by the will should vest at twenty-three. The gift, which but for the proviso

(t) See also *Harrington v. Harrington*, L. R. 5 H. L. 87; 40 L. J. Ch. 716.

(u) 3 Y. & C. 565.

as to vesting would have been valid, was held void for remoteness. Chap. V.

And, generally, a gift to the children or other issue of a living person, or to any class which may include an unborn person, is void for remoteness, if the vesting of shares is postponed to an age beyond twenty-one. Where the gift is accompanied by words specifying a time for payment, there is often great difficulty in determining whether the time specified is annexed to the gift or to the payment. In the one case the gift will be too remote, in the other not. The rules of construction applicable to class and other limitations, and by which the question of vesting is determined, are considered in another chapter (x).

A limitation to a class upon a contingent and remote event, like a limitation to an individual upon a similar event, is void for remoteness; and that whether the class is determined by reference to the contingency or not. *Bull v. Pritchard* (y) seems to be an instance of this, though the decision went upon other grounds. The bequest there was in trust for A. for life, and after her death for such of her children as should attain twenty-three, and if A. should have no children or all should die under twenty-three, to the testator's brothers and sisters. The only child of A. died an infant. It was held that the gift to the brothers and sisters was void as following the gift to the children attaining twenty-three, which was itself void for remoteness. But the gift to the brothers and sisters was void for remoteness in itself, and apart from its connection with the gift to the children; for, though the class of brothers and sisters of the testator was ascertained within the legal period, the vesting was not. The limitation might remain contingent for twenty-three years after the expiration of lives in being.

To a class
upon a con-
tingent event.

(x) *Infra*, p. 206.

(y) As to the personalty, 1 Russ.

213; as to the realty, 5 Ha. 567;
16 L. J. Ch. 185.

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In *Jee v. Audley* (z) the bequest was of a sum of money, upon failure of issue of A., to such of the present and future children of B. and his wife as should then be living. Here the gift was to take effect upon a remote contingent event, and the class was to be ascertained by reference to the same event. The gift was therefore void for remoteness both as to the objects and the event.

In *Hodson v. Ball* (a) the gift was, upon the death of any child of the testator, together with such child's issue, if any, in the lifetime of any husband or wife with whom such child might intermarry, to the other of the testator's children then surviving or the respective issue of such of them as should be then dead. Here also both the class and the event were too remote (b).

To each of a
class a speci-
fied sum.

A gift of a specified sum to each of the members of a class is not a class gift. It is equivalent to so many separate bequests to the several persons answering the common description. In such a gift some of the bequests may be valid, and others void for remoteness. Thus a gift of £500 to each of the present and future children of the testator's present and future nephews and nieces takes effect as to children of nephews and nieces born in the testator's life, and is void for remoteness as to children of other nephews and nieces (c).

So where an uncle bequeathed to his nephew for life, with power to appoint amongst his children, and the nephew appointed £2000 to each of his daughters as and when they should attain twenty-four, and the residue to his sons equally, as and when they should respectively attain twenty-four, with a gift over in the event of no son attaining twenty-four to the daughters at twenty-four, it

(z) 2 Ves. 365; 1 Cox, 324, *rom.*
Gee v. Audley.

(a) 14 Sim. 558.

(b) *Dist. Goodier v. Johnson*,
supra, p. 96.

(c) *Storrs v. Benbow*, 3 D. M. &

G. 390; 22 L. J. Ch. 823; see also
Gooch v. Gooch, 3 D. M. & G. 366;
22 L. J. Ch. 1089; *Boughton v.*
James, 1 Coll. C. C. 26; 1 H. L. C.
406.

was held that the appointment of the several sums of £2000 was good as to such of the daughters as were three years old and upwards at the testator's death; and that beyond this it was void for remoteness (*d*). Chap. V.

From the principle of the decisions in *Pearks v. Moseley*, *To A. and a class.* *Hale v. Hale*, and other cases of the same class (*e*), it would seem that a limitation to A., or to two or more persons by name and a class is void, both as to A. and the class, unless the class, and consequently the amount of A.'s share, must necessarily be ascertained within the legal period. It was so held in *Porter v. Fox* (*f*), where the gift was to A. and the class as tenants in common. The case is not so clear when the tenancy is joint. Although, as a general rule, where one or more joint tenants cannot take the others take the whole (*g*), this does not conclude the question; for the same may be said of tenants in common where they take as a class (*h*), and the rule is clear, that if one of a class may be too remote the whole gift fails. There appears to be no distinction in this respect between a limitation to a class of joint tenants and a limitation to a class of tenants in common. So far as the writer is aware, it has not been held, in any case, that one of two joint tenants can take, where the other is too remote (*i*).

(*d*) *Wilkinson v. Duncan*, 30 Beav. 111.

(*e*) *Supra*, p. 87, *seq.*

(*f*) *Sim.* 485; and in *Webster v. Boddington*, 26 Beav. 128. The observations of Stuart, V.-C., on *Porter v. Fox* in *James v. Lord Wynford*, 1 Sm. & G. 40, 55; 22 L. J. Ch. 450, seem applicable only where the amount of A.'s share is independent of the number of persons comprised in the class; in which case the limitation is valid as to A.; see *Seaman v. Wood*, 22 Beav. 591, 594.

(*g*) *Williams on Executors*, 8th ed. p. 1221; *Larkins v. L.*, 3 B. &

P. 16; *Short v. Smith*, 4 East, 419; *Dowset v. Sweet*, Ambl. 174; *Humphrey v. Tayleur*, *ib.* 136; *Buffar v. Bradford*, 2 Alk. 220; *Morley v. Bird*, 3 Ves. 628; *Davis v. Kemp*, 1 Eq. Ca. Abr. 216.

(*h*) See *Fell v. Biddulph*, L. R. 10 C. P. 701; 44 L. J. C. P. 402; *In re Coleman & Jarrom*, 4 Ch. D. 165; 46 L. J. Ch. 33.

(*i*) As to whether a limitation to one or more individuals, by name, and a class, is a class limitation, see *Cormack v. Copous*, 17 Beav. 397, 404; *In re Featherstone's Tr.*, 22 Ch. D. 111.

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To a class to be ascertained at the expiration of a preceding estate tail.

A limitation of real estate to a class, to be ascertained at or before the determination of an estate tail limited by the same instrument, is not too remote, provided the legal and beneficial interests of all the members of the class are ascertainable immediately upon the determination of the estate tail (*k*).

Cross-remainders between a class of unborn tenants in common for life.

There is some doubt whether cross-remainders for life, or absolutely, can be limited to and between a class of unborn tenants in common for life. In *Ashley v. Ashley* (*l*) Shadwell, V.-C., held a limitation of cross-remainders for life between unborn tenants for life to be valid. And in *Avern v. Lloyd* (*m*) Stuart, V.-C., held that a gift of personalty to a class of unborn persons (the children of a parent then childless), as tenants in common for life, and to the executors administrators and assigns of the survivor of them, was good as being a gift of a contingent absolute interest to each member of the class. These decisions have been questioned (*n*), and the point is not free from doubt. In *In re Edmonson's Trusts* (*o*) a limitation over of the shares of such of the children of a living person as should die under twenty-five to the survivors was held to be void for remoteness. And in *Courtier v. Oram* (*p*), a similar case, the limitation over of a grandchild's share of residue given to the testator's grandchildren living at the death of a child of the testator, upon the death of the grandchild, to the other grandchildren living at the death was held void for remoteness.

To a class to be ascertained at the death

A limitation to a class to be ascertained at the death of a person unascertained at the date of the limitation, and

(*k*) *Heasman v. Pearce*, L. R. 7 Ch. 275; 41 L. J. Ch. 705; reversing the decision of Malins, V.-C., L. R. 11 Eq. 522; 40 L. J. Ch. 258.

(*l*) 6 Sim. 358; 3 L. J. Ch. 61.

(*m*) L. R. 5 Eq. 383; 37 L. J. Ch. 489.

(*n*) See per Malins, V.-C., *Stuart v. Cockerell*, L. R. 7 Eq. 379; 38 L.

J. Ch. 473; and Williams on Settlement of Real Property, 33, as to *Avern v. Lloyd*. See also *Garland v. Brown*, 10 L. T. N. S. 292; and *supra*.

(*o*) L. R. 5 Eq. 389; *Hobbs v. Parsons*, 2 Sm. & G. 212, is a similar case.

(*p*) 21 Beav. 91.

who is, or may be, then unborn is void for remoteness. Thus a gift to the children of the testator's unmarried child who shall be living at the death of the survivor of their parents is void; for the testator's child may marry a person who is unborn at the testator's death (q). But a gift to all the children of the testator's child would, of course, be valid; and that whether the child should marry a person living in the testator's lifetime or born after his death (r).

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of an unascertained or unborn person.

In a recent case (s) a bequest (in effect) to A. for life, and after his death to his descendants bearing a specified name for life as joint tenants, and after the death of the survivor, or in default of such descendants, to charity, was held valid, both as to the life interests given to descendants and as to the charities.

The above rules as to remoteness in class limitations apply, whether the limitation is to the class directly, or to such of a class as a specified person shall appoint, or upon trust for, or upon trust to divide amongst, a class. In no case can events occurring after the testator's death or the date of the limitation, as the case may be, make valid a limitation to a class of which at the testator's death, or the date of the limitation, it cannot be said that it is necessarily ascertainable within the legal period.

A trust to sell lands upon a remote event, and to divide the proceeds amongst a class to be then ascertained, is altogether void for remoteness. No sale can be made under such a trust, nor can the *cestui que trustent* take any benefit under it (t). There is, however, an exception where the trust is to arise, and the class is to be ascer-

Trust to sell upon a remote event and divide the proceeds amongst a class of (1) remote, (2) competent objects.

(q) *Lett v. Randall*, 3 Sm. & Gif. 83; 24 L. J. Ch. 708; *Buchanan v. Harrison*, J. & H. 662; *In re Merri-
rick's Tr.*, L. R. 1 Eq. 551; *Hodson v. Ball*, 14 Sim. 558; 12 L. J. Ch. 80.

(r) *Goodier v. Johnson*, 18 Ch. D

441; 51 L. J. Ch. 369.

(s) *In re Roberts, Repington v. Roberts-Gawen*, 19 Ch. D. 520; 50 L. J. Ch. 265.

(t) *Goodier v. Johnson*, 18 Ch. D. 441; 51 L. J. Ch. 369; *Hale v. Pew*, 25 Beav. 335.

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tained, immediately upon the expiration of an estate tail in the lands (*u*), in which case both the trust for sale and the gift to the class are valid for reasons stated elsewhere (*x*). And a trust to sell, arising upon a remote event, and to divide the proceeds amongst a class to be ascertained within the legal period, with a trust of the rents and profits for the same class until sale, though void for remoteness as to the trust for sale, was in *Goodier v. Johnson* (*y*) held to be a valid limitation of the lands to the class described.

Limitation to a class by way of legal remainder.

A limitation of real estate to a class by way of legal remainder may be valid, where, if the subject of limitation had been personal estate, or, being real estate, if the limitation took effect otherwise than by way of legal remainder, it would be void for remoteness. Thus a devise to A. for life, and after his death to such of his children as shall attain twenty-two, is not void for remoteness; although, if no child has attained twenty-two at A.'s death, the limitation is for other reasons void, and the remainder will fail to take effect. But a devise to A. for life, and after his death to trustees (so as to vest in them the legal estate) upon trust for such of A.'s children as shall attain twenty-two, is void for remoteness. Under the former limitation no child can take who has not attained twenty-two at the termination of a life in being. Under the latter, the class to take is not necessarily ascertained until twenty-two years after the termination of lives in being. So it seems to follow from a recent decision that a devise to A. for life, and after his death to such of his children as, either before, or after his death, attain twenty-two, is void for remoteness; because (since the limitation takes effect by way of executory use and not of remainder) (*z*)

(*u*) *Heasman v. Pearse*, L. R. 7 369.
Ch. 275; 41 L. J. Ch. 705.

(*x*) P. 146.

(*y*) 18 Ch. D. 441; 51 L. J. Ch.

(*z*) See *In re Lechmere & Lloyd*, 18 Ch. D. 524; but see as to this case, *supra*, p. 41.

the class is not necessarily ascertained within the legal period. The explanation of this apparent exception of limitations of real estate by way of legal remainder from the operation of the Rule against Perpetuities is that the feudal rule, which requires a legal remainder to vest at or before the determination of the particular estate, excludes from the class to take those members who would vitiate the limitation if it operated by way of executory use or trust. The application of the Rule against Perpetuities to legal remainders is further considered below (a).

Limitations to classes are frequently ambiguous as regards the definition of the class, the persons intended to be included, and the time of vesting. Where this is the case, the true construction of the instrument must be ascertained before the question of remoteness can be answered. The time for ascertaining the class is determined by the ordinary rules of construction without regard to the question of remoteness. A consideration of these rules is not within the scope of the present work (b). Three cases, however, should here be mentioned in which remoteness appears to have influenced the Court in determining the period for ascertaining the class.

Time for ascertaining the class is a question of construction.

Apparent exceptions.

In *Kevern v. Williams* (c) the testator bequeathed his residuary personal estate upon trust for the benefit of A. for life, and after her death for the grandchildren of B., "to be by them received in equal proportions when they should severally attain the age of twenty-five years." Both A. and B. survived the testator, and no grandchild had attained twenty-five at the death of the testator, or at the death of A. It was held that the gift to grandchildren was not void for remoteness, and that those grandchildren only took who were living at the death of A. It is difficult

(a) *Infra*, p. 163. See also 3 Preston on Conveyancing, 555, cited in Butler's note, F. C. R. 315.

(b) For a statement of these rules, see 2 Jarman on Wills, 4th ed. pp.

147, *seq.*; Hawkins on Wills, 68—79; Theobald on Wills, 2nd ed. 243—268, 605—608.

(c) 5 Sim. 171. See 16 Sim. 285, as to this case.

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to see why, under the rule in *Andrews v. Partington* (d), the class to take was not all the grandchildren who survived the testator or were born before a grandchild first attained twenty-five. Stress was laid on the fact that the gift was distinct from the direction as to payment. But the rule in *Andrews v. Partington* applies, whether the vesting or the payment only is postponed to the given age (e).

In *Elliott v. Elliott* (f) the gift was "unto and amongst all and every the children, sons and daughters of his (the testator's) daughters, in equal shares and proportions as and when they should attain their respective ages of twenty-two years." It was held that only children living at the testator's death took, and that there was no remoteness. Here also the only reason for excluding grandchildren born after the testator's death and before a grandchild attained twenty-two seems to have been, that such a construction would have been fatal to the gift (g).

In *Leach v. Leach* (h) the testator bequeathed personal estate, after the death or subsequent marriage of his widow and the deaths of his brother and sister, to A. and the other children of his brother for life; and he directed the principal to be divided amongst the issue (children) of A. and the other children and to be transferred to them upon their severally attaining twenty-one. It was held that the gift was to A. and two other children who were living at the testator's death and their children. The will was obscure; and the fact that, if children born after the testator's death had been included, the gift to their issue would have been too remote, appears to have influenced the Court in excluding them.

(d) 3 Bro. C. C. 401.

(e) *Gillman v. Daint*, 3 K. & J. 48.

(f) 12 Sim. 276; 10 L. J. Ch. 363.

(g) It does not appear that any grandchild had attained twenty-two at the testator's death.

(h) 2 Y. & C. C. C. 495.

The mere fact that in the description of the class are included grandchildren, great-grandchildren, or any number of future generations of issue of a living person, is immaterial, provided there be an explicit direction, or the intention is clear, that the class, whatever it be, is to be ascertained, and that the limitation must vest, within the legal period; as, for instance, at the death of a living person (*i*), or when a child of a living person attains twenty-one (*k*).

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To a class of remote issue to be ascertained within the legal period.

The following is a summary of cases in which the question of remoteness has arisen in connection with limitation to classes. The class is described in each case, not in the words of the limitation, but so as to show clearly the constitution of the class, and the time at which it is to be ascertained.

Summary of class limitations.

In the following cases the class has been held too remote, and the limitation void:—

(1) Cases in which the class has been held too remote and the limitation void.

Gifts—

To the children of A., a spinster, living when a daughter of A. first attains twenty-four (*l*).

To the children of A., a spinster, living at the death of the survivor of A. and her future husband (*m*).

To the brothers and sisters of A. (who took a life interest) upon their respectively attaining twenty-five or being sisters marrying (*n*).

To the testator's next of kin at the time of failure of children of unborn children of A. (*o*).

To the children of A. living when the youngest attains twenty-five and the issue of children of A. then dead (*p*).

To the children of A. who attain twenty-one and the

(i) See per Westbury, C., in *Wetherell v. Wetherell*, 1 D. J. & S. 134, 139; 32 L. J. Ch. 476. With reference to the dictum of Westbury, C., in this case, it is submitted that it is not necessary that the class should "come into possession" of the property within any definite time, provided the limitation vests in interest within the legal period.

(k) Per Romilly, M.R., in *Packer v. Scott*, 33 Beav. 511.

(l) *Dodd v. Wake*, 8 Sim. 615.

(m) *Lett v. Randall*, 3 Sm. & G. 83; 24 L. J. Ch. 708.

(n) *Leake v. Robinson*, 2 Mer. 363.

(o) *Hale v. Pew*, 25 Beav. 335.

(p) *Read v. Gooding*, 21 Beav. 478.

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To the testator's grandchildren at (i.e. such of them as attain) twenty-one (r).

To such of the four individuals A. B. C. and D. as shall be living at the death of the survivor of the testator's daughter and her future husband and the children *per stirpes* who survive their parent of such of the four as shall then be dead (s).

To A. B. and all other the present and future children of C. living at C.'s death who attain twenty-one or marry and the children who attain twenty-one or marry of such of them as die in C.'s life *per stirpes* (t).

To the testator's grandchildren living at the death of the survivor of their parents (u).

To the children of A. attaining twenty-one and the issue attaining twenty-one or dying under that age leaving issue of children of A. dying under twenty-one *per stirpes* (x).

To the issue of any present or future child of A. who should die leaving issue and the surviving children of A. upon the death of any such child of A. without leaving issue (y).

To grandchildren of A. living at the death of such of the present or future children of A. as should die last (y).

To A. and a remote class as tenants in common (z).

To the children of E. a bachelor living at the death of his eldest son and the children *per stirpes* of such of the children of E. as are then dead (a).

- | | |
|---|---|
| (q) <i>Seaman v. Wood</i> , 22 Beav. 591. | H. 662. |
| (r) <i>Cromek v. Lumb</i> , 2 Y. & C. 565. | (x) <i>Pearks v. Moseley</i> , 5 Ap. Ca. 714; 50 L. J. Ch. 57. |
| (s) <i>In re Merrick's Tr.</i> , L. R. 1 Eq. 551. | (y) <i>Gooch v. Gooch</i> , 14 B. 565; 3 D. M. & G. 366; 21 L. J. Ch. 238; 22 L. J. Ch. 1089. |
| (t) <i>Webster v. Boddington</i> , 26 Beav. 128. | (z) <i>Porter v. Fox</i> , 6 Sim. 485. |
| (u) <i>Buchanan v. Harrison</i> , 1 J. & | (a) <i>Stuart v. Cockerell</i> , L. R. 5 Ch. 713. |

To a class to be ascertained fifty years after the testator's death consisting of children of the testator their children and remoter issue (*b*).

To children of A. who attain twenty-five or being daughters marry (*c*).

To the daughters of A. and B. his wife living at the failure of C.'s issue (*d*).

To the next of kin of the testator to be ascertained at the death of his surviving grandchild (*e*).

To such of the testator's children as should be living at the death of a child of the testator or failure of such child's issue, which should last happen, in the lifetime of any husband or wife of the child and the issue (*per stirpes*) of such of the testator's children as should be then dead (*f*).

To the children attaining twenty-two (*g*); twenty-three (*h*); twenty-four (*i*); twenty-five (*k*); of A. or of the testator's sons or daughters.

To A. for life and after his death to his descendants bearing a specified name for life (*l*).

To the children of A. who attain twenty-five except A. B. and C. (*m*).

To the testator's children living and the issue of such as should be dead upon failure at any time of issue of one of the testator's daughters (*n*).

(*b*) *Speakman v. Speakman*, 8 Ha. 180.

(*c*) *Griffith v. Blunt*, 4 Beav. 248; 10 L. J. Ch. 372.

(*d*) *Jee v. Audley*, 1 Cox, 324; 2 Ves. 365.

(*e*) *Hayes v. Hayes*, 4 Russ. 311.

(*f*) *Hodson v. Ball*, 14 Sim. 558.

(*g*) *Vaudry v. Geddes*, 1 R. & M. 203; *Thomas v. Wilberforce*, 31 Beav. 299.

(*h*) *Bull v. Pritchard*, 1 Russ. 213; 16 L. J. Ch. 185.

(*i*) *Newman v. Newman*, 10 Sim. 51; 8 L. J. Ch. 354; *In re Blake-more's Settlement*, 20 Beav. 214.

(*k*) *Judd v. Judd*, 3 Sim. 525; *Ring v. Hardwick*, 2 Beav. 352; 4 Jur. O. S. 242; *Chance v. Chance*, 16 Beav. 572; *Rowland v. Tawney*, 26 Beav. 67; *Boreham v. Bignall*, 19 L. J. Ch. 461; 8 Ha. 131; *Blagrove v. Hancock*, 16 Sim. 371; 18 L. J. Ch. 20; *Pickford v. Brown*, 2 K. & J. 426; 25 L. J. Ch. 702.

(*l*) *In re Roberts, Repington v. Roberts-Gawen*, 19 Ch. D. 520; 50 L. J. Ch. 265.

(*m*) *Comport v. Austen*, 12 Sim. 218.

(*n*) *Webster v. Parr*, 26 B. 236.

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To all the testator's grandchildren who attain twenty-four (*o*) or twenty-five (*p*).

To the testator's grandchildren living at the death of each of his present and future grandchildren (*q*).

To the child if one only or the children if more than one of A. who attain twenty-five and survive her; the gift being of a sum to be raised from and after a child attains twenty-five, and A. being *enceinte* at the testator's death of her only child who afterwards attains twenty-five (*r*).

Cases in which the class has been held not too remote, and the limitation valid.

In the following cases the class has been held not too remote and the limitation valid :—

To the great grandchildren of A. living when a child of B. first attains twenty-one (*s*).

To such of A.'s children as shall attain twenty-five; A. having died after the date of the will and before the testator (*t*).

To the children of the testator's unmarried son and daughter and the issue (by way of an independent substitutionary gift which was void for remoteness) of such of the children as should die before the death of the survivor of the son daughter and son's future wife (*u*).

To such of the testator's children living at his death as should attain twenty-two (*x*).

To the grandchildren of B. living at the death of A. (with a direction as to payment at twenty-five) (*y*).

To the children of A. and B. who attain twenty-five; there being a child of twenty-five at the testator's death (*z*).

To the grandchildren and great-grandchildren (*per capita*

(*o*) *Newman v. Newman*, 10 Sim. 51.

(*p*) *Blagrove v. Hancock*, 16 Sim. 371; 18 L. J. Ch. 20.

(*q*) *Courtier v. Oram*, 21 Beav. 91.

(*r*) *Mertin v. Blagrove*, 25 Beav. 125.

(*s*) See per Romilly, M.R., *Packer v. Scott*, 33 Beav. 511.

(*t*) *Southern v. Wollaston*, 16 Beav.

166; 22 L. J. Ch. 664.

(*u*) *Goodier v. Johnson*, 18 Ch. D. 441; 51 L. J. Ch. 369.

(*x*) *Elliott v. Elliott*, 12 Sim. 276; 10 L. J. Ch. 363.

(*y*) *Kevern v. Williams*, 5 Sim. 171.

(*z*) *Picken v. Matthews*, 10 Ch. D. 264; 48 L. J. Ch. 150.

or *per stirpes*) of A. living at the death of a child of A. which child was living at the testator's death (*a*).

To the testator's cousins living at his death or born before the death of his widow and the issue of cousins dying in the widow's life, such issue taking *per stirpes* and by substitution (*b*).

Gift of the proceeds of sale of real estate, directed to be sold upon failure or expiration of an estate tail limited by the will, to the children of B. other than A. living at the failure or expiration of the estate tail and the issue of such of B.'s children as should be then dead and the issue of A.; with a substitutionary gift to their children of the shares of members of the above class who should die before the period of distribution (*c*).

To the present and future children of A. with gifts over which are too remote, as upon the death of a child under thirty to the survivors (*d*), or upon the death of all the children under twenty-five (*e*).

To A. and B. "and all their children and their heirs for ever" (*i.e.* to A. and B. and their children as tenants in common in fee) (*f*).

After the death of the survivor of A. and B. to the immediate or direct descendants of A. or B. bearing a specified name for life (*g*).

(*a*) *Wetherell v. Wetherell*, 1 D. J. & S. 134; 32 L. J. Ch. 476.

(*b*) *Baldwin v. Rogers*, 3 D. M. & G. 649; 22 L. J. Ch. 665.

(*c*) *Heasman v. Pearse*, L. R. 7 Ch. 277; 41 L. J. Ch. 705.

(*d*) *Taylor v. Frobisher*, 5 De G. & Sm. 191; 21 L. J. Ch. 605.

(*e*) *Hardcastle v. Hardcastle*, 1 H. & M. 405; 7 L. T. N. S. 503.

(*f*) *Cormack v. Copous*, 17 Beav. 397.

(*g*) *In re Roberts, Repington v. Roberts-Gawen*, 19 Ch. D. 520; 50 L. J. Ch. 265.

CHAPTER VI.

LIMITATION TO AN UNASCERTAINED PERSON; SETTLEMENT
OF HEIR-LOOMS AND PERSONAL PROPERTY BY REFER-
ENCE TO LIMITATIONS OF REALTY; EXECUTORY AND
EXECUTED TRUSTS.Chap. VI.

Limitation to
a person who
at a future
time shall
answer a given
description.

AS, in the case of a limitation to a class of persons answering a common description, it is necessary that the class should, at all events, be capable of being ascertained within the legal period, so, where the limitation is to an individual answering a given description, it is void for remoteness, unless it is certain, when the instrument takes effect, that there will be in existence and ascertained within the legal period a person answering the description.

*Proctor v.
Bishop of
Bath and
Wells.*

The leading case on this branch of the subject is *Proctor v. Bishop of Bath and Wells (a)*. The testator in that case devised to the first or other son of A. (a living and childless person) who should be bred a clergyman and be in holy orders. By ecclesiastical law no person can, without a faculty, be admitted to orders before the age of twenty-three years. It was held that the gift was void for remoteness. The result would be the same in the case of a gift to the child of a living person acquiring, after the testator's death, any other qualification not necessarily attainable during infancy.

(a) 2 H. Bl. 358.

The cases in which remoteness has been involved in the description of the person to take have, for the most part, been those where property is limited by reference to limitations contained in the same or another instrument of other property; or where the attempt has been made to attach the enjoyment of the property to the possession, either of other property, or of a dignity. The question of remoteness in these cases is one of great difficulty; and the difficulty is not unfrequently increased by obscurity in the terms of the limitation. There is perhaps no class of cases upon the subject of remoteness in which there has been more difference of opinion in the Courts than that now under discussion.

The first case of importance is *Ibbetson v. Ibbetson* (b). The testator there devised a reversion in fee simple expectant upon an estate in tail male, to which he was entitled under his marriage settlement, to his brother for life, with remainder to the brother's sons successively in tail. He bequeathed chattels to trustees, in trust to permit the same to be used by the person for the time being entitled to the possession of the real estate under the settlement, or the will, until a tenant in tail of the age of twenty-one years should be in possession under the settlement or will; and he directed that the chattels should belong to such tenant in tail absolutely. It was held that the trust of the chattels, except as to the brother's life interest, was void for remoteness.

Lord Dungannon v. Smith (c), an important and leading decision of the House of Lords upon this subject, followed *Ibbetson v. Ibbetson*. The testator there bequeathed leaseholds for years upon trust for his grandson,

(b) 10 Sim. 495; on app. 5 M. & Cr. 26; 11 L. J. Ch. 49; 4 Jur. O. S. 408.

(c) 12 Cl. & F. 546; 10 Jur. O. S. 721; the same will came before Sir E. Sugden in Ireland, and he there

expressed a strong opinion (in accordance with the decision of the House of Lords) against the validity of the gift; see *Ker v. Dungannon*, 1 Dr. & War. 543.

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Arthur, for life, and after his death to permit such person who for the time being would take by descent as heir male of the body of the grandson to take the profits until some such person should attain twenty-one, and then to convey the leaseholds to such person, his executors, administrators, and assigns. The eldest son of the grandson attained twenty-one in the grandson's life, and claimed to be entitled to the leaseholds. It was held by the House of Lords, in accordance with the opinions of nine out of the eleven judges who attended, that the bequest of the leaseholds was too remote and altogether void. Lord Lyndhurst, in moving the judgment of the House, spoke thus: "The disposition of these leasehold premises, of the *corpus*, was to a person answering two descriptions. He was to be heir male of the body taking by descent from Arthur Trevor, the grandson, and he was to be of the age of twenty-one years. It is quite obvious that these two circumstances might not combine for many generations; and indeed it is possible they might never combine. It is obvious, therefore, that this disposition of the property is void for remoteness; for, as everybody knows, property of this description must vest if at all within a life or lives in being and twenty-one years afterwards; and, to speak with perfect correctness, a few months for gestation. It is wholly immaterial in this case that there was a person twenty-one years of age answering the description at the time; [that is] to make use of a phrase of a noble and learned lord in the case of *Tollemache v. Earl of Coventry* (*d*), that was a pure accident; it might, or it might not have happened. Unless it is absolutely certain that that event must happen within the period prescribed, it is quite clear that the rule of remoteness applies to the case, and the devise becomes altogether void. . . . But, my lords, it is supposed that the gift of the *corpus* of the estate is operated upon in some degree by the disposition

(*d*) 2 Cl. & F. 611.

of the intermediate rents and profits. The disposition of the intermediate rents and profits is to the person who, for the time being, should take by descent as heir male of the body of the grandson, until some such person shall have attained the age of twenty-one years. Now the disposition of the *corpus* of the estate is to a person answering two descriptions or qualities. The intermediate rents and profits are taken by a person, or persons, who answer one of these descriptions. It appears to me that the dispositions can exist entirely unconnected with each other, that they have no necessary relation to each other, and that the disposition of the rents and profits to particular individuals under this will no more affects the disposition of the *corpus* of the estate than if that disposition had been to mere strangers" (e).

The point decided by *Dungannon v. Smith* is that a limitation to the first of a series of persons, all successively answering a common description, who acquires a given qualification (as the attainment of the age of twenty-one) is altogether void, unless it must necessarily take effect within the legal period. It is not valid as to some of the members of the series, and void for remoteness as to the others—those, namely, who will, or may, acquire the specified qualification beyond the legal period. The question is, not whether this or that member of the series, if he takes at all, must take within the legal period, but whether the property, if taken at all, under the limitation, must be taken within the legal period. "The question," said Cresswell, J. (f), "is not, as I apprehend, whether A. or B., if he took, must take in due time, but whether the estate, if taken by any one under this bequest, must be taken in due time." This point had arisen, but was not discussed, in previous cases (g).

(e) Cited by Lord Cairns in *Harrington v. Harrington*, L. R. 5 H. L. 87, 105; 40 L. J. Ch. 716.

(f) 12 Cl. & F. p. 564.

(g) *Taylor v. Biddall*, 2 Mod. 289; *Trafford v. Trafford*, 3 Atk. 347; see per Tindal, C.J., 12 Cl. & F. 617, and per Lord Brougham, *ib.* 631.

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*Wainham v.
Field.*

Dungannon v. Smith was followed by Wood, V.-C., in *Wainham v. Field* (h). There the testator devised freeholds to trustees in trust for R. for life, with remainder to W. for life, with remainders over in tail. He devised his leaseholds to trustees upon trust to allow the rents to be received by the person for the time being entitled to the freeholds until such person should by good assurance become seised of the freeholds in fee simple in possession, and then in trust to convey or assign the same to him. It was held by Wood, V.-C., that the limitation of the leaseholds was void for remoteness, except as to the life interests of R. and W. The Vice-Chancellor said: "Clearly there can be no acquisition of the property under such a series of limitations until some tenant in tail of the freehold estates shall have attained an age at which it will be competent to him to execute a disentailing deed by which he may acquire an absolute interest in them. That could not be done until such tenant in tail attained twenty-one, and therefore the freehold estates might travel through a long series of successive minorities for centuries; and the case is therefore precisely similar in this respect to *Dungannon v. Smith*."

Limitation to
A. on B. ac-
quiring other
property.

*Harding v.
Nott.*

The acquisition of a given description by a person named is sometimes required to determine, not the person who is to take, but the time at which the limitation is to take effect. Thus in *Harding v. Nott* (i) there was a bequest of leaseholds to A. in the event of B., or the issue male of his body, becoming entitled to certain lands under another instrument. By that instrument the lands were limited to Z. for life, with remainder to trustees to preserve, &c., with remainders to the sons of X. successively in tail, with remainder to B. for life, with remainder to trustees to preserve, &c., with remainders to the sons of B. successively in tail. Under these limitations a son of B. became

(h) *Kay*, 507.

(i) 7 Ell. & Bl. 650; 26 L. J. Q. B. 244.

entitled to the lands as tenant in tail. It was held that he took nothing under the bequest of the leaseholds, which was void for remoteness. Chap. VI.

Owing to the rule of law which governs legal remainders of real estate, a contingent remainder may be limited to a person answering a given description at the termination of the particular estate (being an estate tail, or a life estate necessarily determining within the legal period), which will not take effect, if at the termination of the particular estate there is in existence no person answering the required description, but cannot be void for remoteness. Thus in *Thorpe v. Thorpe* (*k*) there was a devise, in remainder after previous estates for life and in tail, to "my own right heirs of the name of Henry Thorpe, if any such there shall then be (*l*), for ever." It was held that the testator's heir-at-law (whose name was not Henry Thorpe) was entitled to the reversion expectant upon the determination of the estates for life and in tail; his reversion being defeasible in favour of a right heir of the name of Henry Thorpe, if any such should be living at the termination of the prior estates. It was assumed that the contingent remainder to the right heir of that name was not void for perpetuity.

A gift to persons answering a given description at the testator's death is, of course, free from objection; and a gift of the income of property to the persons from time to time answering a given description has, in some cases, been supported as an immediate gift of, either the *corpus*, or the income, to the persons answering the description at the testator's death. Gift of income to person from time to time answering a given description.

In *The Commissioners of Donations v. De Clifford* (*m*) there was a gift of the surplus rents and profits of real

(*k*) 1 Hurls. & C. 326; 32 L. J. Ex. 79; 8 Jur. N. S. 871; see also *Wrightson v. Macaulay*, 14 M. & W. 214; 4 Ha. 487; 15 L. J. Ex. 121; 17 L. J. Ch. 54.

(*l*) The word "then" is omitted in the statement of the devise, 1 Hurls. & C. 328.

(*m*) 1 Dr. & War. 245.

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estate (beyond a specified sum which was given to charity) to the person or persons of the S. and C. families who from time to time should be lords of the manor of D. It was held to be an immediate gift of the surplus rents in fee simple to the persons answering the given description at the testator's death.

In *Liley v. Hey* (n) a gift of rents of real estate upon trust to pay the same, every 1st of December, to the families of certain persons named, according to their circumstances, and as the trustees should think fit, was supported at least as to the lives of the persons named in the will. The gift was, in the opinion of the Court, to those persons for life, with remainder to their "families."

A gift of a yearly sum to the person for the time being holding a specified office (not being a charitable gift) was in *Thomson v. Shakespear* (o) held to be void for remoteness.

In re Roberts (p) was an obscure will by which a fund was bequeathed in trust for the testatrix' brother and nephew successively for life, and after the death of the survivor, upon trust to pay the income "for life unto any immediate or direct lineal descendants of my said brother or nephew, who shall bear the name of R. G. only, and from and after his or her decease, or in case of failure of any such immediate or direct descendant of my said brother or nephew who shall bear the name of R. G. only," upon trust for charities. There was a clause determining the interests of any descendants who should abandon the name of R. G. It was held by Hall, V.-C., upon the authority of *Lord Dungannon v. Smith* (q), *Boughton v. James* (r), and *Tollemache v. Coventry* (s), that the gift after the deaths of

(n) 1 Ha. 580; 11 L. J. Ch. 415.

(o) Johns. 612; 12 Jur. N. S. 616.

(p) *In re Roberts, Repington v. Roberts-Gawen*, 19 Ch. D. 520; 50 L. J. Ch. 265.

(q) 1 D. & W. 509; 12 C. & F. 546; 10 Jur. O. S. 721.

(r) 1 Coll. C. C. 26; on app. 1 H. L. C. 406.

(s) 2 C. & F. 611; 8 Bl. N. S. 547.

the brother and nephew was void for remoteness as being to a succession of "descendants" for life; and, consequently, that the gift over to charity also failed. This decision was reversed on appeal; the gift being construed to be, after the deaths of the brother and nephew, to descendants, if any such there should then be, of the specified name, as joint tenants for life; or, in the alternative, if there should be no such descendants then living, to the charities; and, if there should be descendants to take, to the charities after the death of the survivor of the descendants. Both gifts, therefore, that to the descendants, also that to the charities, were valid.

In *Ibbetson v. Ibbetson*, *Dungannon v. Smith*, and *Wainham v. Field*, the limitation held to be too remote was intended to have a single operation in favour of one individual. The taker was to be that one of a class or series of persons answering in succession a common description who should first acquire a given qualification, not necessarily to be acquired by any of the class or series within the legal period. Here, as in the case of a limitation to a class taking concurrently, the rule is, that if any one member of the class or series may be too remote the limitation is altogether void. "If the devise be to a single person answering a given description at a time beyond the limits allowed by the law, or to a series of individuals answering a given description, and any one member of the series intended to take may, by possibility, be a person excluded by the rule as to remoteness (*t*), then no person whatever can take; because the testator has expressed his intention to include all, and not to give to one, excluding others" (*u*).

Limitation to each of a series or class of persons in succession.

In the following cases the limitation in favour of a class

(*t*) *I.e.*, to all the members of the series contingently, but so as to vest in one of the series so soon as one shall acquire a qualification not necessarily to be acquired by any one

within the legal period.

(*u*) Per Wood, V.-C., in *Catlin v. Brown*, 11 Ha. 372, 376; and see per Sir E. Sugden in *Ker v. Lord Dungannon*, 1 Dr. & War. 509, 533.

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or series has not, as in *Dungannon v. Smith*, a single operation vesting the absolute interest in an individual, but a recurrent operation, creating partial interests in favour of the members of the class or series in succession. A common instance of this is where the enjoyment of heirlooms or other property is annexed to the possession of a dignity or settled real estate. The rule here also is, that where the intention is clearly expressed that all the members of the series without limit shall in succession enjoy the property for life, and any of the series may be beyond the line of perpetuity, the whole limitation is void. But the Courts struggle against a construction which invalidates the entire limitation; and will, if possible, construe the limitation either as being in favour of such members only of the series as are within the line of perpetuity, or, as an executory trust, to be carried out so far as the law permits. The principle upon which the Court acts in such cases was explained by Wood, V.-C., in a recent case, *In re Johnson's Trusts* (x). The testator there devised freeholds to his nephew for life, remainder to his first and other sons in tail successively, with remainders over. He bequeathed residuary personalty upon trust to pay the dividends and income "from time to time as the same shall become payable unto such person or persons as for the time being shall by virtue of this my will be entitled to the rents and profits of my freehold hereditaments hereinbefore devised," with a gift over (held to be too remote) of the capital upon failure of issue of the nephew. It was held that the nephew took the personalty for life, and that after his death his eldest son was entitled to it absolutely. Wood, V.-C., said that the question was whether the personalty was to go to the same uses as the real estate—that is, to the first tenant in tail absolutely, subject to the nephew's life interest—or whether there was an attempt to create a

In re Johnson's Trusts.

(x) L. R. 2 Eq. 716; 12 Jur. N. S. 716.

perpetuity. "In all these cases the Court looks not so much to the special intention as to the general intent; and although, in conformity with Sir W. Blackstone's argument in *Perrin v. Blake* (Hargreave's Tracts, 510), the words may seem to point to a limited intention of tying up the property in a succession of takers so that it cannot be disposed of, yet, when a general intent can be found that the property should go with the estate, then the personalty will follow the realty by vesting in the taker of the first estate of inheritance. That is, of course, unless the words point plainly to a succession of takers, in which case the gift will fail." In the case before him he held that there was a plain general intent, and no expressed intention to tie up the property beyond the legal period; that it was governed by *Foley v. Burnell* (y).

The length to which the Courts will go in carrying out the "general" intention in these cases is shown by *Mackworth v. Hinman* (z). There a gift was held to be valid, notwithstanding the expressed intention that the property should never be alienated from a specified baronetcy, and that each succeeding baronet should enjoy it for life. The testator bequeathed personal estate upon trust to pay the income to Sir G. A., Baronet, for life, and after his death A. his eldest son for life; but in case he should die leaving no son, then in trust for the person on whom the baronetcy should devolve, so that each baronet should take the income for life; with a direction that upon the extinction of the baronetcy the capital should fall into the residue. At the testator's death Sir G. A. and his brothers James and Robert were living. Sir G. A. died without issue, and the baronetcy devolved upon James, and, after James' death, upon Robert. It was held that James took the personalty absolutely. Lord Langdale, M.R., said: "In all cases of this description the question is, What is the general

(y) 1 Bro. C. C. 274; 4 Bro. P. C. 319. (z) 2 Keen, 658; 5 L. J. Ch. 127.

Chap. VI. intention of the testator which the Court is to carry into execution? His intent here was that the property should go on to all time with the baronetcy. He accordingly says, his will is, that it should never be alienated from the title, but that each succeeding baronet should enjoy it for life. . . . For the purpose of accomplishing the intention I think it must be held that Sir G. A. took a *quasi* estate tail in the property, and that the property, being personal, was absolutely at his disposal" (a).

*Bacon v.
Proctor.*

In *Bacon v. Proctor* (b) the testator devised lands to trustees upon trust to raise and pay certain sums by accumulating rents, and after payment thereof upon trust to pay the rents to such person of his own name and blood as should succeed to his title of baronet; to the end that the lands might be continued in his family, and go along with the title, so long as the rules of law and equity would permit; with remainder over in case, upon failure of issue male of his body, there should be no person entitled to succeed to the baronetcy. It was held that the testator's son, the next baronet, took the lands for his life. There was no declaration as to the interest of any subsequent taker.

*Tollemache v.
Coventry.*

In *Tollemache v. Lord Coventry* (c) the testator, Lord Vere, bequeathed chattels upon trust for his wife and son successively for life, with remainder to such person as should, from time to time, be Lord Vere; it being his will that the same should, after the death of the wife, go and be enjoyed with the title of the family, so far as the rules

(a) In Sugden's Law of Property (p. 341, note) it is stated that Robert could not take "because James' unborn issue, if there had been any, would have taken before him; but there does not appear to have been any reason why James should have been held to take so as to defeat his issue, if he had any." Elsewhere (1 Dr. & War. 538) Lord St. Leonards doubts whether the decree, though founded on the testator's supposed

intention, carried it out by giving James the absolute interest.

(b) T. & R. 31.

(c) 2 Cl. & F. 611; 8 Bli. N. S. 547; in the Court below *nom. Deerhurst v. Duke of St. Albans*, 5 Mad. 232. This decision and that of Sir W. Grant in *Lord Dorchester v. Earl of Effingham*, 3 Beav. 180, note, cannot stand together; see Sugd. Law of Prop. 342; 1 Dr. & War. 536.

of law and equity would allow. A son and grandson, who became successively the second and third Lords Vere, were living at the testator's death. Sir John Leach held that a great-grandson of the testator, born after his death, who became the fourth Lord Vere took the chattels absolutely. This decision was reversed in the House of Lords by Lord Brougham, who held that, as to the great-grandson, the gift was void for remoteness. It appears to have been assumed that, as to the grandson, the gift was valid. The contest being between the grandson and great-grandson, there was no argument as to the validity of the gift to the former. It has been pointed out (*d*), and it was indeed admitted by Lord Brougham, that his reasons for holding the gift to the great-grandson void for remoteness are fatal to the gift to the grandson. These reasons appear to call in question the possibility of attaching the enjoyment of property to the ownership of a dignity, by reason of the liability of the dignity to abeyance. There can be no doubt that within the line of perpetuity property can be so settled, and that the observations of Lord Brougham upon the subject in *Tollemache v. Lord Coventry* require qualification.

In *Lord Dungannon v. Smith* (*e*) Parke, B., expressed the opinion that *Mackworth v. Hinxman*, *Bacon v. Proctor*, and *Tollemache v. Earl of Coventry*, "are authorities for making a distinction between the first and subsequent members of a series whose titles are distinct from each other;" and that those cases are authorities in favour of the validity of the bequest in *Dungannon v. Smith* as regards the son of Arthur, the grandson. This opinion (which the decision of the House of Lords shows to be erroneous) is founded on the assumption that a gift to the member of a class or series who first answers a given description can be read as a series of distinct gifts to

(*d*) Sugd. Law of Property, 330, seq.; Lewis Perp. 469.

(*e*) 12 C. & F. 609, *supra*, p. 113.

Chap. VI. the several members of the class. As Tindal, C.J., remarked, this is not interpreting the will as it is, but is virtually making a new will for the testator.

Settlement of heir-looms or personal property to follow real estate or a dignity.

A bequest of chattels or personal estate to a series of persons in succession, by reference to limitations for life and in tail of real estate, is void for remoteness, if the bequest includes all the tenants in tail of the land, that is to say, tenants in tail by descent as well as by purchase. But the Courts have shown themselves unwilling to adopt such a construction where it is possible to confine the gift to tenants in tail by purchase. Even where the words of reference *primâ facie* include all tenants in tail, the restricted construction has, in recent cases, been adopted by the House of Lords.

Christie v. Gosling.

In *Christie v. Gosling* (*f*) the testator bequeathed a sum of money upon trust to be laid out in the purchase of a freehold house, which he directed his trustees to hold to the use of his nephew for life, with remainder to the first and other sons of the nephew in tail. He gave his real estate and residuary personal estate to trustees, upon trust to stand possessed of the personalty and seised of the realty to the uses and upon the trusts, &c., declared concerning the house directed to be purchased, or as near thereto as the rules of law and equity would permit; provided nevertheless that the personal estate should not vest absolutely in any tenant in tail unless such person should attain the age of twenty-one years. It was held by the House of Lords (Lords Chelmsford and Cranworth, *dissentiente* Lord St. Leonards) that the decision of Lord Westbury in the Court below was correct, and that the nephew, having attained twenty-one, took the personalty absolutely. "The question," said Lord Chelmsford (*g*), "is whether the proviso is a qualification of the preceding limitation making it liable to be divested on the death of a tenant in tail

Effect of proviso that the personalty shall not vest in tenants in tail dying under twenty-one.

(*f*) L. R. 1 H. L. 279; 35 L. J. Beav. 58; 1 D. J. & S. 1.
Ch. 667; in the Courts below, 32 (*g*) L. R. 1 H. L. p. 289.

under twenty-one, or whether it is a description of the person who is to take the personalty being only a tenant in tail attaining twenty-one. In the latter case the gift would be to a class, and as it might vest the estate in one who could not take on account of the law against perpetuity, the bequest, according to the well-known cases cited in the argument (*h*), would wholly fail." The proper construction of the bequest of the personalty was not, he added, to incorporate the proviso with the limitation, so as to make the whole one entire description of the person to take, but was, to take the referential limitation by itself, and then to graft the proviso upon it. The effect was to give the personal estate to the tenant for life of the realty for his life, and after his death to his first son (the first tenant in tail by purchase), absolutely. The proviso applied only to such tenant in tail by purchase taking the personalty, and qualified the bequest in the event of the legatee not attaining twenty-one. Lord Cranworth took the same view. "The object of the proviso," he said, "was to restrict the class who, but for the proviso, would have taken absolutely, not to let in any class of persons who, if there had been no proviso, would have taken nothing." Lord St. Leonards strongly dissented from these opinions, and held that the proviso was part of the gift, and that to construe it as applying only to tenants in tail by purchase was to introduce words into the will which were not there, and to exclude an important class of issue whom the testator intended to take, and who were within the words of the will. He considered that *Lord Dungannon v. Smith* (*i*) and *Leake v. Robinson* (*k*) governed the case. To argue that there was no gift in the will to tenants in tail except tenants in tail by purchase was to say that tenants in tail of the realty by descent

(*h*) *Dungannon v. Smith*, 12 Cl. & F. 546; *Catlin v. Brown*, 11 Ha. 375; 1 W. R. 533.

(*i*) 12 Cl. & F. 546.
(*k*) 2 Mer. 363.

Chap. VI. did not take under the will, which was contrary to the fact.

*Martelli v.
Holloway.*

In *Martelli v. Holloway* (l) the House of Lords (Lords Hatherley, Chelmsford, and Westbury) followed *Christie v. Gosling* (*ubi supra*). There a testator gave his real and personal estate to trustees upon trust to accumulate the income during the successive minorities of persons entitled to such estate under the subsequent limitations of his will, and to add the accumulations to his personal estate (m). Subject thereto, the trustees were directed to hold the real and personal estate upon trust for the testator's grandson for his life, and after his death for his first and other sons in tail, with remainders to the daughters of the grandson in tail, with remainders to the testator's heirs and next of kin according to the nature of the property. Then followed a proviso: "I declare it to be my will and meaning that such person as shall under this my will be entitled to an estate tail in possession in my real estate shall not be absolutely entitled to my leasehold and personal estates until he or she or they respectively shall attain the age of twenty-one, and that my leasehold and personal estates shall absolutely belong only to such person or persons as shall first attain the age of twenty-one years and become entitled to an estate tail in possession in my real estate under the trusts aforesaid." The grandson was in possession of the life estate under the will when his eldest son died under twenty-one without issue. The second son of the grandson attained twenty-one in his father's life. It was held that the second son of the grandson took the personal estate absolutely. The grounds of the decision were similar to those in *Christie v. Gosling*, which case was held to give the rule and to conclude the question in favour of the second son of the

(l) L. R. 5 H. L. 532; 42 L. J. Ch. 26; in the Courts below *nom. Holloway v. Webber*, L. R. 6 Eq. 523; 37 L. J. Ch. 865.

(m) This trust for accumulation was declared void for remoteness by Lord Eldon in *Marshall v. Holloway*, 2 Sw. 432.

grandson. The proviso set out in the text, it was held, was not a new and independent disposition, descriptive of a new class, but a qualification of the previous disposition of the personalty, which was in favour only of such of the tenants in tail of the realty as took by purchase. It was to be construed with reference to the subject matter of the limitation; and the subject matter being personal estate, which cannot descend, tenants in tail by purchase, who alone could take the personalty, must be intended in the proviso of defeasance. The words "in possession" were, in order to avoid a repugnancy, construed to refer to a tenant in tail who, but for the antecedent life estate, would be entitled to receive the rents and profits (*n*).

A disposition of personal estate to go along with settled realty does not fail for remoteness because none of a class of issue to whom prior estates tail are limited ever come into existence. It takes effect as a limitation in the alternative—or, as it is expressed, with a double aspect—to the issue, if there are any; if none, over (*o*).

Disposition of heir-looms does not fail for remoteness where there are no issue in tail to take.

When personal estate is limited upon trust to follow real estate it is of importance to determine whether the trust is executory or not; since words which in the case of an executory trust are innocent, in a trust that is not executory may be fatal to the entire trust. Where the direction is that the personalty shall go along with the realty so far as the law will allow, or so far as the rules of law and equity will permit, the use of such expressions does not give rise to an executory trust (*p*). And it makes

Direction that personalty shall follow settled realty so far as the law will permit.

(*n*) When the intention is clear that no one who is not in actual possession of the lands is to take the chattels, it will be carried out by the Court; *Hogg v. Jones*, 32 Beav. 45; *Potts v. Potts*, 3 J. & L. 353; 1 H. L. C. 671; *Cox v. Sutton*, 25 L. J. Ch. 345.

(*o*) See *Stanley v. Leigh*, 2 P. W. 686; *Sabbarton v. Sabbarton*, Cas. t. Talb. 55, 245; *Gower v. Grosvenor*, Barnard. 54; 5 Mad. 337; *Scars-*

dale v. Curzon, 1 J. & H. 40; 19 L. J. Ch. 126; *Williams v. Lewis*, 6 H. L. C. 1013; 28 L. J. Ch. 505.

(*p*) There has been some conflict of authority upon this point, but the rule as stated in the text was recognised as settled by Lord Cottenham in *Rowland v. Morgan*, 2 Ph. 764; 17 L. J. Ch. 339; 18 L. J. Ch. 78; by Lord Hatherley in *Scarsdale v. Curzon*, 1 J. & H. 40; 29 L. J. Ch. 249; and by the House of Lords in

Chap. VI. no difference that the personalty is bequeathed to trustees upon trust to permit the same to go along with the realty in similar terms (q).

But the precise meaning of these and similar words is not free from doubt. As stated above, it is well settled that they do not create an executory trust, so as to enable the Court to mould the gift and confine it within the line of perpetuity. Though often regretted (r), this is now a fixed rule of construction. But there is authority for the opinion that the words do of themselves confine the operation of the trust within the legal limit. In *Harrington v. Harrington* (s) Lords Westbury and Cairns held that this was their effect; though Lord Hatherley in the same case declined to express an opinion upon the question. In *Vaughan v. Burslem* (t) it was said that the meaning of the words is, that when you come to an estate tail in the limitations of the realty, there you stop, and give an absolute interest in the personalty. But this seems a narrow construction, and the better opinion is that they have the meaning ascribed to them by Lords Westbury and Cairns in *Harrington v. Harrington* (u).

It will be seen from *Christie v. Gosling* and *Martelli v. Holloway* that where the trust of the personalty is declared by reference to limitations in the same instrument of realty, its duration is confined to the legal period without the aid of any such words. In such cases the proviso against vesting in tenants in tail under twenty-one is construed as applicable only to tenants in tail by purchase, and not to tenants in tail by descent. If, as in the modern forms, the proviso is, that the personalty shall not

Christie v. Gosling, L. R. 1 H. L. 279, 284; *Harrington v. Harrington*, *ib.* 5 H. L. 87; 40 L. J. Ch. 716.

(q) *Carr v. Lord Erroll*, 14 Ves. 478.

(r) By Lord Westbury, L. R. 5 H. L. 101; by Lord Cottenham, 2 Ph. 767.

(s) *Ubi supra*.

(t) 3 Bro. C. C. 101.

(u) See *Tollemache v. Earl of Coventry*, 8 Bligh, N. S. 547; *Pownall v. Graham*, 33 Beav. 242; *Christie v. Gosling*, L. R. 1 H. L. 279, as to the effect of these and similar words.

vest in a tenant in tail by purchase dying under twenty-one and without issue, the trust would fail for remoteness, unless the class of incapacitated tenants in tail is expressly restricted to those who take by purchase (x). In other words, if the trust of the chattels provides for their devolution, upon the death of a tenant in tail by purchase under twenty-one leaving issue, to such issue, a proviso as to vesting applicable to such issue, and unrestricted in point of time, would cause the entire trust to fail for remoteness.

The third Earl of Harrington (y) by his will bequeathed chattels "in trust for the person or persons who for the time being shall under the settlement of my mansion house and estates be in the actual possession of the same mansion house and estates, to the end and intent that all and singular such (chattels) may be deemed and considered as heir-looms to go along and for ever be used and enjoyed with the same mansion house and estates so far as the rules of law or equity will permit, but so, nevertheless, as that the same chattels personal shall not as to the effect or purpose of transmission vest absolutely in any person who under and by virtue of any settlement shall or may become seised of or entitled to the said mansion house and estates for an estate of inheritance either in possession or reversion or otherwise, unless such person shall attain the age of twenty-one years, or dying under that age shall leave issue inheritable under the limitations in any settlement thereof." The residuary personal estate was bequeathed to trustees upon trusts for conversion and investment of the proceeds in the purchase of real estate to be settled to the same uses as the mansion house and estates above mentioned. These estates were subject to a settlement under which the testator was tenant for life, with remainder to his eldest son (afterwards fourth earl) for life, with

(x) See 3 Dav. Preced. 3rd ed. of *Harrington*, L. R. 5 H. L. 87; 602, note (s). 40 L. J. Ch. 716.

(y) *Countess of Harrington v. Earl*

Chap. VI. remainder to trustees to preserve contingent remainders, with remainder to the first and other sons successively of the testator's eldest son in tail, with remainders in like manner to the other sons of the testator successively for life and to their respective sons successively in tail male, with an ultimate remainder to the testator in fee. The eldest and second sons of the testator succeeded to the possession of the mansion house and estates, and became fourth and fifth earls. The fifth earl was succeeded by his son, the sixth earl. The latter became the first tenant in tail in possession under the settlement, and died under twenty-one without issue. The defendant, who was the eldest son of the testator's third son, and was born in the testator's lifetime, succeeded to the mansion house and estates and became seventh earl. He disentailed, and the contest was between the mother and administratrix of the sixth earl (plaintiff) and the seventh earl (defendant) as to the title to the chattels. It was held by the House of Lords that the seventh earl was entitled to the chattels, either under the residuary gift, or under the limitation carrying over the chattels upon the death of the sixth earl without issue and under twenty-one. Lord Hatherley and Lord Cairns abstained from expressing an opinion whether the proviso in the will, purporting to carry over the chattels upon death under twenty-one, was void as transgressing the perpetuity rule. Lord Westbury held that, the death of the sixth earl having happened within the time allowed by the perpetuity rule, the direction that the heir-looms should accompany the settled estates remained in force, and carried them over to the defendant; that according to the true construction of the proviso divesting the interest of an infant tenant in tail in the chattels upon his death under twenty-one, its operation was confined to the time during which the heir-looms were directed to accompany the settled estates, that is to say, so long as the perpetuity rule permitted. Lord Cairns held that the "dispositive"

part of the trust of the chattels carried them to the sixth earl, and that the clause of defeasance, which qualified the dispositive part of the trust—the clause namely beginning “but so nevertheless”—prevented the chattels vesting in the sixth earl. In the Court below (*z*) Lord Cairns had varied a decree of Malins, V.-C., holding that the effect of the trust was to carry over the chattels from the sixth to the seventh earl, by declaring that upon the death of the sixth earl the chattels fell into the residue. In the House of Lords he intimated the opinion that the words might have the effect of carrying the chattels to the seventh earl, as decided by Malins, V.-C., in the Court below, and by Lord Westbury in the House of Lords (*a*).

A covenant to settle leaseholds upon trusts corresponding with the uses of real estate, limited in strict settlement so far as the rules of law will permit, is executory. It creates an executory trust (*b*), and a shifting clause carrying over the leaseholds within the line of perpetuity upon the deaths under twenty-one of tenants in tail of the realty will be introduced (*c*). And in a recent case a bequest of chattels to A. “to go and be held as heir-looms by him and his eldest son, and so on to the eldest son of his descendants, as far as the rules of law or equity will permit,” with a request that A. should give effect to the wish that the chattels should go as heir-looms, was held to be executory (*d*).

And a trust may be executory, although there is no direction to execute a settlement. “Where, instead of

(*z*) L. R. 3 Ch. 564.

(*a*) A collection of forms of trusts of heir-looms as settled by Mr. Duval, Lord St. Leonard's and other eminent conveyancers, will be found in a note to this case; L. R. 5 H. L. 93. See also 3 Dav. Pced. 3rd ed. 624, notes (*d*) and (*e*).

(*b*) See per Westbury, C., L. R. 4 H. L. 565.

(*c*) *Duke of Newcastle v. Countess of Lincoln*, 3 Ves. 387. The trust

there was to settle “as far as the law in that case would allow and permit.” In *Christie v. Gosling*, L. R. 1 H. L. 279, it was said by Chelmsford, C., that a trust, if expressed so as to offend against the Rule against Perpetuities, would not be made valid by the words “so far as the rules of law and equity will permit.”

(*d*) *Shelley v. Shelley*, L. R. 6 Eq. 540; 37 L. J. Ch. 357.

Executory trust to settle personalty so as to go along with realty.

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expressing exactly what he means, that is, filling up the terms of the trust, (the testator) tells the trustees to do their best to carry out his intention" (e), the trust is executory, and capable of being moulded so as to avoid perpetuity.

In *Miles v. Harford* (*ubi supra*) the testator devised freeholds in W. to his third son and his issue male, with remainder to his fourth son and his issue male, in strict settlement; and he devised freeholds in C. to his fourth son and his issue male, with remainder to his fifth son and his issue male, in strict settlement. And he bequeathed leaseholds in C. "upon and for such trusts and purposes and with under and subject to such powers provisions and declarations as, regard being had to the difference in the tenures of the premises respectively, would best and most nearly correspond with the uses trusts powers provisions and declarations in the said will declared and contained of and concerning" the freeholds. There was the common clause to prevent a tenant in tail of the leaseholds getting an absolute interest unless he attained twenty-one (f); and a shifting clause providing that, in the event of the fourth son or his issue becoming entitled in possession under the will to the freeholds in W., and the fifth son or any of his issue male being then living, the limitations of the freeholds in C. should cease. The third son died without issue, and the fourth son became entitled in possession to the freeholds in W. It was held that the shifting clause was executory, and for this and other reasons was not void for remoteness; and that it operated to carry the leaseholds in C. to the fifth son. The meaning of the words declaring the trusts of the leaseholds was not, said the Master of the Rolls, that the limitations of the freeholds were to be literally repeated in the case of the leaseholds,

(e) Per Jessel, M.R., in *Miles v. Harford*, 12 Ch. D. 691, 699; 41 L. T. N. S. 378.

(f) This appears from the judgment.

in which case the bequest of the leaseholds would to a great extent fail for remoteness, but that those limitations were to be so moulded as to avoid remoteness and correspond, as nearly as might be, with the disposition of the freeholds, having regard to the different subject matter to which they were to be applied. "It will be absurd to suppose," he said, "that you have regard to the nature of the tenure to make them (the trusts) best correspond, when you simply make them null and void. He (the testator) knows that something will not work, and he says that you are to make them correspond, having regard to that; that is, having regard to the effect of the tenure on the limitation or the proviso. But when you see the tenure is of such a kind that it cannot be done by literally repealing the provisions, then you must modify them accordingly. That seems to me to be exactly what the testator has told you to do—'best or most nearly'—that is, having regard to the assistance which conveyancers can offer—they will show the way so to mould the trusts that, having regard to the nature of the tenure, they will not fail. And it appears to me, therefore, when you look at a trust of this kind, the testator does create what I say is, in the soundest sense, an executive trust. . . . And I venture to say there is no lawyer in the kingdom worthy of the name who would put in a clause of this kind literally so as to infringe the Rule against Perpetuities."

The manner in which the Court will carry out an executory trust to settle property, so that it shall accompany other property or a dignity into the hands of successive takers, is illustrated by the following cases.

Lord Le Despencer (*g*) conveyed real estates to trustees, upon trust, after the deaths of himself and his son, to settle the same to the use of such persons for such estates and in such manner that they should, so far as the law would

Mode of executing a trust to settle property so that it shall go along with other property or a dignity.
Baukes v. Le Despencer.

(*g*) *Baukes v. Baroness Le Despencer*, 10 Sim. 576; 11 Sim. 508; 9 L. J. Ch. 185; 4 Jur. O. S. 601; 7 Jur. O. S. 210.

Chap. VI. permit, be strictly settled so as to go along with the dignity of Le Despencer so long as the person possessed thereof should be a lineal descendant of the settlor; and so that during every suspension or abeyance of the same dignity within the limits prescribed by law for strict settlement, the rents of the estates might be divided equally amongst the co-heirs, *per stirpes*, of the person or persons respectively by reason of whose death or deaths without issue male such suspension should be occasioned. It was held that the trust was not void for remoteness. It was suggested by the Court (Shadwell, V.C.) that the settlement might be in this form:—To trustees for 1000 years, determinable at the end of twenty-one years from the death of the survivor of all persons in being at the date of Lord Despencer's death (query, date of the original settlement) and then capable of succeeding to the dignity, and that, subject thereto, the estates be limited to the persons so *in esse* and capable of succeeding for their lives successively, with remainder to their sons in tail, with remainder to their daughters in tail. And the trusts of the 1000 years term, to be declared to be, that in the event of their being any abeyance as mentioned in the original settlement the rents should go as therein provided.

By the settlement which eventually was executed by order of the Court, the estates were limited to the lineal descendants, male and female, of the settlor; as to those born before the creation of the executory trust for life successively, with remainders to their children in tail; and as to those born after the creation of the trust, in tail; and as to female descendants as tenants in common for life or in tail, as the case might be, with cross remainders in tail. A proviso was added to the effect that, if, during the lives or life of the descendants to whom life estates were limited or the survivor or twenty-one years after the death of the survivor, the estates should at any time be vested under

the limitations in two or more female descendants in undivided shares, and at the same time the dignity should not be in abeyance but should be revived in favour of a lineal descendant of the settlor, then the limitations therebefore limited should cease, and the estates should vest in the person entitled to the dignity for the like estate and with like remainders over as were therebefore limited to her or him, or in remainder after her or his estate (*h*).

In a recent case (*i*) an executory trust was declared of chattels to go as heir-looms to a specified line of donees, without reference to any limitations of real estate. The bequest was of jewels to A., the testatrix' nephew, "to go and be held as heir-looms by him and by his eldest son, and so on to the eldest son of his descendants as far as the rules of law or equity will permit. And I request that my said nephew will do all in his power, by will or otherwise, to give effect to this my wish as to these things so directed to go as heir-looms as aforesaid." The gift was held to be a valid executory trust for A. for life, with remainder to B. (A.'s eldest son) for life, with remainder to B.'s eldest son, to be vested at his age of twenty-one; but if he should die in B.'s life or after B.'s death under twenty-one and leaving an eldest son born in B.'s life, in trust for such eldest son to be vested at his age of twenty-one; and if the jewels should not vest under any of the aforesaid limitations, in trust (subject to B.'s life interest) for A. absolutely (*k*).

Where lands are devised upon an executory trust to assure the same in a course of limitations to correspond as nearly as may be with the limitations of an inalienable hereditament, such as a dignity, the trust is executed by

(*h*) The terms of the settlement are stated in 7 Jur. O. S. 211; and, not so fully, 11 Sim. 508.

(*i*) *Shelley v. Shelley*, L. R. 6 Eq. 540; 37 L. J. Ch. 357.

(*k*) See further as to the effect of an executory trust such as that in the text, 3 Dav. Prec. 3rd ed. 601, note.

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limiting the lands so that they will be inalienable so far as the law allows. The enjoyment of the lands is made to follow the ownership of the dignity until the Rule against Perpetuities requires the inheritance in the lands to vest (*l*). So a direction, that chattels shall follow real estate through all its changes of ownership until the time arrives when the law requires the absolute interest to vest, will be carried out, even where the trust is not executory, by implying trusts of the chattels corresponding, as nearly as may be, with the limitations of the realty, and so as to secure their being transmitted in the same line with the realty so long as the Rule against Perpetuities allows (*m*).

The manner in which the Court will execute a trust directed to endure so long as the law allows, or otherwise limited in duration by a reference to the Rule against Perpetuities, is illustrated by *Pownall v. Graham* (*n*). The gift there was to the testator's seven brothers during their lives and the life of the survivor, and after the death of the survivor the trustees were to apply the income in favour of the brothers' children yearly "as the law in such cases admits," and, "after the law, as mentioned aforesaid, admits of no further division," they were to hold the fund in trust for the eldest son of A. It was held that the trust for the brothers' children came to an end twenty-one years after the death of the survivor of the brothers.

Tregonwell v.
Sydenham.

In *Tregonwell v. Sydenham* (*o*) there was a gift by will of money to be raised by a term limited in remainder after an estate tail devised to the unborn son of a tenant for life. The money was given to trustees in trust to be applied in the purchase of lands, which were to be conveyed to the use of the person for life who should, upon failure or expiration of the estate tail, be in possession of

(*l*) See per Westbury, C., *Sackville-West v. Lord Holmesdale*, L. R. 4 H. L. 543, 568, 39 L. J. Ch. 505.

(*m*) See per Lord Westbury,

Harrington v. Harrington, L. R. 5 H. L. 87, 101; 40 L. J. Ch. 716.

(*n*) 33 Beav. 242; 9 Jur. N. S. 318.

(*o*) 3 Dow. 194.

certain other settled estates, with remainders for life to the persons successively in possession of the same estates under the settlement (p). The tenant for life of the estates in which the term was limited died after the testator without having had any issue in tail. At his death the person in possession of the estates referred to was a person born after the testator's death. It was held by Lords Redesdale and Eldon that, in the events which had happened, the uses of the lands to be purchased were void for remoteness; and (the contest being between the testator's heir-at-law and the owner of the estates in which the term was created as to the right to the term) that the term was well created, and resulted to the heir-at-law of the testator as personal estate undisposed of by the will. The decision involved the further conclusion that, had the person in possession of the settled estates been a person in existence at the testator's death, he would have taken the purchased estates for life. It is not clear why the person actually in possession did not take for life, since the Rule against Perpetuities does not prevent an unborn person taking a life estate (q). Perhaps if the opinion of the House of Lords had been adverse to the heir-at-law, this contention would have been raised. As it was, the testator's heir-at-law being, in fact, the person in possession of the settled estates, the result, as regards the right to the term, would have been the same whether the trust to convey the purchased lands was valid as regards the life estate to the heir-at-law and void for remoteness as to the remainders, or whether the entire trust to convey was too remote.

It is difficult to state the proposition of law for which *Tregonwell v. Sydenham* is an authority. Lord St. Leonards (Law of Property, 326) says it decides that "Where property is given for life to persons *in esse* and to unborn issue in succession, although the gift will, of

(p) This seems to have been the effect of the direction to convey.

But see *infra*.

(q) See *infra*, p. 174.

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course, be inoperative as to those who are incapable of taking life estates on account of remoteness, yet it will be supported as to those who are capable of taking for life when there is no preceding limitation which is void as being too remote." Mr. Lewis (Perp. 586) treats it as a decision that "the trust for settlement of future property is not necessarily confined to an execution in conformity to the laws of remoteness; but unless the course of events admits of such an execution the whole trust will fail." And he likens such a trust to a power of appointment amongst objects some of whom may be too remote. It is clear that Lord St. Leonards and Mr. Lewis are not agreed as to the true construction of the will in *Tregonwell v. Sydenham*. The former treats the direction to convey as requiring a conveyance to one for life, with remainders to successive generations of his issue for life. Mr. Lewis thinks it would be executed by a conveyance to one for life, with remainders to his issue in strict settlement. The former seems to have been the construction adopted by the House of Lords. The result of the case may perhaps be thus stated: that a trust to convey land, upon the failure or expiration of previous estates for life and in tail, to a person to be ascertained at the time of such failure, with remainders to his issue, is valid as to the ultimate remainders, if the person indicated was born when the trust was created, and void for remoteness if he was not.

The validity, therefore, of an executory trust to convey lands in a series of limitations, to be ascertained when the time arrives for executing the trust, does not depend upon its being so expressed that it is incapable of being executed in favour of remote objects. It is valid so far as it is capable of being executed in favour of objects who are not too remote; and the possibility of its being executed in favour of remote objects does not make the whole void for remoteness.

A gift to a class comprising persons possibly unborn at

the testator's death, followed by a direction to settle the shares of females upon them for life with remainders to their children, and in default of children at the discretion of the trustees, was in *Lyddon v. Ellison* (r) supported by Romilly, M.R., on the ground that it was an executory trust which the Court would carry out as far as the rules of law permitted. It will appear elsewhere that a clause of this sort, modifying absolute interests previously limited to all the members of a class, as to some of which it cannot take effect for remoteness, is nevertheless valid as to the other shares. And this is so, it would seem, whether the clause in question is an executory trust or not (s).

(r) 19 Beav. 565; 18 Jur. O. S. 1066.

(s) See *Wilson v. Wilson*, 28 L. J. Ch. 95, and cases cited above, p. 97.

CHAPTER VII.

LIMITATIONS AFTER OR IN DEFEASANCE OF AN ESTATE
TAIL.

Chap. VII. It is sometimes stated broadly that no limitation after an estate tail is too remote. This is true only in a limited sense; the question remains, What is a limitation after an estate tail, so as to be exempt from the Rule against Perpetuities? On the one hand a disposition barrable by the tenant in tail may, nevertheless, be too remote; on the other, a limitation taking effect in defeasance of an estate tail, and collateral to it, may be within the protection of the estate tail. Of the former the power sometimes given to trustees of a settlement to enter and manage the estates during minorities of successive tenants in tail, without limit as to time, is an example; of the latter the common name and arms clause in a strict settlement of real estate is a well known instance.

Speaking
generally no
limitation
after an estate
tail can be
void for re-
moteness.

“Speaking generally,” says Mr. Butler, “no period is too remote for the limitation of an executory estate or interest engrafted on an estate tail previously limited. Thus if land were limited to A. in fee simple, or for ninety-nine years, and, if A. should have no child who attains the age of twenty-seven years, to B., in each case the limitation to B. would be void for its remoteness; but if the land were limited to A. in tail, and, if A. should have no child who attains the age of twenty-seven years, to B., the limitation

will be good (a). The reason is that a common recovery by a tenant in fee simple will not discharge his estate from an executory limitation engrafted upon it; but an executory limitation engrafted on an estate tail is discharged by the recovery of the tenant in tail; so that, where an executory limitation is engrafted on an estate tail, it is always liable to be defeated by the recovery of the tenant in tail, and therefore the remoteness of the event on which it depends does not suspend the absolute ownership of the property so as to effect a perpetuity" (b).

A limitation after or collateral to an estate tail is valid, whether the estate tail is limited immediately, or in remainder, and whether it is vested, or contingent. The name and arms clause in a settlement containing limitations in tail to unborn sons of a living tenant for life is an instance of a remote limitation protected by a contingent estate tail in remainder.

Whether the estate tail is in possession or in remainder, vested or contingent

But a limitation by way of executory or springing use, or any way of trust, depending for its validity upon a contingent estate tail, fails for remoteness, if the estate tail never arises. Thus a devise to A. for life, remainder to A.'s sons successively in tail, remainder to trustees for a term upon trusts that are too remote, fails for remoteness, as to the trusts of the term, if A. never has a son (c).

But the estate tail must arise

A limitation after, or collateral to, an estate tail that is itself too remote is, of course, invalid (d).

And be itself valid.

The dispositions, connected with estates tail, with regard to which the question of remoteness has been principally discussed, are: (1) limitations by way of legal remainder expectant upon an estate tail; (2) similar limitations in

(a) But see *infra*, p. 147, as to an executory use that will, or may, take effect after, and not immediately upon, the expiration of an estate tail.

(b) Butler's note, F. C. R. 522.

(c) *Tregonwell v. Sydenham*, 3

Dow. 194, *supra*, p. 136. In *Sykes v. Sykes*, L. R. 13 Eq. 56; 41 L. J. Ch. 25; the estates tail which, it was contended, protected the trusts of the term never, in fact, arose.

(d) See *infra*, p. 288.

Chap. VII. remainder upon trust for persons ascertained at or before the expiration of the estate tail; (3) limitations by way of executory, springing, or shifting use taking effect upon an event that may, or that must, happen after the failure or expiration of the estate tail; (4) limitations by way of executory, springing, or shifting use collateral to the estate tail and taking effect in defeasance of the estate tail; (5) limitations taking effect under powers collateral to an estate tail; and (6) trusts, or powers in the nature of trusts, taking effect by virtue of an estate antecedent to the estate tail.

Limitations by way of legal remainder expectant upon an estate tail.

First, as to limitations by way of legal remainder expectant upon an estate tail. These are valid in all cases where the estate tail is itself well created. Whether the estate tail and the remainder are both, or either, of them vested or contingent, and limited to persons ascertained at the date of the limitations, or not, the remainder is free from objection on the ground of remoteness (*e*).

Jack v. Fetherston.

In *Jack d. Westby v. Fetherston* (*f*) the limitation (by deed) was, to A. for life, remainder to his sons successively in tail male, and in default of such issue male and in case of issue female only of A., to A. in fee; and in case of failure of issue of A., over. The ultimate limitation was held valid.

Cole v. Sewell.

In *Cole v. Sewell* (*g*) lands were limited to trustees, to the use of the settlor for life, with remainder, subject to a term, to the use of his three daughters for their lives, as tenants in common, with remainder to trustees during the life of each daughter to preserve contingent remainders, with remainder, as to the share of each daughter, at her death, to the use of her first and other sons successively in

(*e*) *Cole v. Sewell*, 4 Dr. & War. 214; 4 Ha. 487; 15 L. J. Ex. 121; 1; on app. 2 H. L. C. 186; *Doe d. Winter v. Peratt*, 9 Cl. & F. 606; 17 L. J. Ex. 54.
 (*f*) 2 Huds. & Br. 320; 9 Bli. N. S. 237; 3 Cl. & F. 67.
 (*g*) 4 Dr. & W. 1; 2 H. L. C. 186.
Wrightson v. Macaulay, 14 M. & W.

tail male, with remainder, in case of the death of any one or more of the daughters without issue male, to the use of the survivors or survivor during their or her lives or life, with remainder, in like manner as to the original share, to the use of the first and other sons of such surviving daughters or daughter in tail male, with remainder, in case all the daughters should die without issue male, as to the share of each, to the use of the daughters as tenants in common in tail; and, in case one or more of the daughters should die without issue, it was provided that the share or shares of such daughter should go to the use of the daughters of the survivors or survivor as tenants in common in tail. It was held that the limitation, in case of failure of the issue generally of any of the daughters, to the daughter of the survivors or survivor, was a good contingent remainder, and not void for remoteness.

In *Thorpe v. Thorpe* (*h*) the devise was, in remainder after estates for life and in tail, to "my own right heirs of the name of Henry Thorpe, if any such there shall then be (*i*), for ever." It was held to be a good contingent remainder to the right heir of the name, if any should be living at the termination of the previous estates.

In *Doe d. Winter v. Peratt* (*k*) there was a limitation in tail male (*l*) to A., with remainder to "the first heir male" of a specified family, who should live at specified place. No question was raised as to the validity of the limitation; the discussion being as to who was meant by "first heir male."

The question whether, in *any* case, a legal remainder can be void for remoteness is considered elsewhere (*m*).

(*h*) 1 H. & C. 326; 8 Jur. N. S. 871; 32 L. J. Ex. 79.

(*i*) The words "shall then" appear to have been omitted by mistake in the first report.

(*k*) 3 M. & Scott, 586; 7 Scott, N. S. 1; 9 Cl. & F. 606. See also

Wrightson v. Macaulay, 4 Ha. 487; 17 L. J. Ch. 54.

(*l*) This seems to have been the effect of the limitation, though no estate tail, in fact, arose.

(*m*) *Infra*, p. 163.

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Though an estate of freehold, or a term of years, limited in remainder after an estate tail is protected by the estate tail, and cannot be too remote, the trusts of the estate so limited in trust may be void for remoteness, and fail to take effect, either altogether, or in part, as the case may be (*n*).

Devise of a reversion expectant upon an estate tail.

A devise of a reversion expectant upon an estate tail may, it seems, be void for remoteness where a similar devise of a legal remainder would be free from objection. In *Bankes v. Holme* (*o*) real estate was settled upon A. for life, with remainder to his intended wife for life, with remainders to the sons of the marriage in tail male and to the daughters of the marriage in tail, with remainder to A. the settlor, in fee. A. by his will, executed after the settlement, reciting that he was seised of the reversion in fee expectant upon the death of his wife contingently upon failure, or death without issue, of children of the marriage, devised the reversion upon a general failure of issue of children. The devise was held void for remoteness (*p*).

So in a previous case, *Lady Lanesborough v. Fox* (*q*), where, at the date of the will, the lands stood limited to the testator for life, remainder to A., his son, for ninety-nine years if he should so long live, remainder to trustees and their heirs during the life of A., remainder to the first and other sons of A. successively in tail male, reversion to the testator in fee, a devise of the reversion on failure of issue of A. and for want of heirs male of the body of the testator, was held void for remoteness.

Whether the devise of a reversion expectant upon an estate in tail general expressed to take effect upon failure of a particular class of the issue in tail, as upon failure of issue male, would be valid or void for remoteness, has not

(*n*) See *infra*, p. 161.

(*o*) 1 Russ. 394, note.

(*p*) In Sugd. Law of Prop. 355, it is suggested that the devise might have been supported as being in-

tended to take effect only in the event of failure of issue at the wife's death. See also *supra*, p. 68, note (*e*).

(*q*) Ca. t. Talh. 262.

been decided. Such a limitation is the converse of that in *Bankes v. Holme*. The latter was void for remoteness as being an executory limitation, which, after the determination of the estates tail without having been barred, might take effect at any distance of time. The limitation under consideration must take effect, if at all, immediately upon the expiration of the estate tail; and, being barrable during the whole of its existence up to that time, would seem to be unobjectionable. Chap. VII.

(2.) Limitations in remainder after an estate tail upon trusts in favour of persons to be ascertained at or before the expiration of the estate tail. These are valid whether the trust is of the land itself, or of proceeds of sale of the land, or of a sum to be raised out of the land. Limitations in remainder after an estate tail upon trust for persons then or previously ascertained.

In *Goodwin v. Clark* (r) there was a settlement of lands upon marriage to the use of the husband and wife successively for life, with remainder to the use of the sons of the marriage in the usual manner in tail male, and, if the husband should die without issue male, remainder to trustees for a term, upon trust to raise portions for daughters of the marriage. The husband and wife died, leaving a son and a daughter. The son afterwards died without issue male. It was held that the term arose to the daughter; "And as to the objection of a perpetuity it is nothing, for the son who had the estate precedent might bar it by a common recovery. And of this opinion were all the Court except Mallet."

In *Morse v. Lord Ormonde* (s) the testatrix devised real estate to A. for life, with remainders to her first and other sons successively in tail male, with remainder to her daughters in tail, and, in default of all such issue of A. (held to mean issue to whom estates tail were limited), to trustees for a term, upon trust to raise and pay legacies. And the testatrix bequeathed legacies "from and imme-

(r) 1 Lev. Pt. 1, 35; 1 Sid. Pt. 1, 102, *nom.* *Goodiar v. Clark*. (s) 5 Mad. 99; 1 Russ. 282.

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diately after the decease and failure of issue" of A. The gifts of the legacies was held valid, and not too remote.

In *Faulkner v. Daniel* (t) the testator devised real estate for life, with remainders in tail in strict settlement; and, in an event specified, which was held to be that of the limitations failing or becoming exhausted, he charged the lands with £5000, to be paid to his niece. It was held that the charge of the £5000 was not too remote.

In *Heasman v. Pearse* (u) the testator devised real estate in tail, with remainder to the use of trustees, upon trust to sell and divide the proceeds amongst a class of issue to be then ascertained. A proviso was added that if the real estate should ever be sold under the above-mentioned trust for sale, and the money should become payable to the issue as aforesaid, and any of such issue should be then dead leaving issue, then such last-mentioned issue should take the share to which their parent would have been entitled if living. It was held by the Appeal Court, (James and Mellish, L.J.J.,) reversing the decision of Malins, V.-C. (x), that the proviso substituting issue for their parents dying before the period of division was not void for remoteness, and carried over the shares of a parent dying before the expiration of the estate tail to his issue. In delivering the judgment of the Court James, L.J., said: "No limitation after estate tail is . . . too remote; and it appears to us clear that, whether the limitation be directly to a class of issue to be ascertained at the determination of the estate tail, or a gift to a trustee for such class, or upon trust to convey to such class, or to sell and divide the produce amongst such class, is wholly immaterial, if the legal and beneficial interests should be both ascertainable at the moment of the determination of the estate tail" (y).

(t) 3 Ha. 199; 8 Jur. O. S. 29.

(x) L. R. 11 Eq. 522.

(u) L. R. 7 Ch. 275; 40 L. J. Ch. 258; 41 L. J. Ch. 705.

(y) L. R. 7 Ch. 281.

(3.) As to limitations by way of executory, springing, or shifting use, and corresponding trusts, taking effect upon an event that may, or that must, happen after the failure or expiration of the estate tail. There is no express decision upon the point, but it would seem that upon principle these limitations are altogether void for remoteness. Of such a limitation it cannot be said that it must take effect, if at all, within the legal period. Upon the failure or determination of the estate tail without having been barred, it is indestructible, and becomes capable of taking effect at any distance of time.

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Limitations by way of executory, springing, or shifting use, taking effect upon an event that will, or may, happen after the expiration of the estate tail.

In *Jack v. Fetherston* (z) it was assumed that a limitation upon a general failure of issue of A., to whose sons estates in tail male were limited, could not be supported, except as a remainder. "It is clear that if it be not a remainder it cannot be sustained, being too remote" (a). And in *Cole v. Sewell* (b), a similar case except that the daughters of the tenants for life took estates in tail general, there was no suggestion that such a limitation could be supported except as a legal remainder; and the arguments were directed to show that it was a remainder, and not an executory limitation.

A case is mentioned in *Sanders on Uses* (c) in which such a limitation was held to be void. "An estate having been settled by will to uses in strict settlement, a rent charge was limited to arise after the failure of issue of a person not taking any estate in the property settled. And upon argument it was determined by the Court of King's Bench in Ireland that the limitation of the rent charge was void as being too remote."

That such a limitation is void altogether, and not valid or void for remoteness according to the event, seems to

(z) 2 Huds. & Br. 320; 9 Bli. N. S. 237.

(a) Per Bunshe, C.J. (Ireland). These seem to be the words of the learned judge, and not of the argu-

ment.

(b) 4 Dr. & War. 1; 2 H. L. C. 186.

(c) *Hartopp v. Lord Carbery*, 1 Sand. on Uses, 5th ed. p. 204.

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follow from the rule that it is a condition precedent to the validity of an executory use that it cannot by possibility take effect beyond the legal period (*d*). A limitation to the use of A. for life, remainder to trustees upon trust to convey to the first son of B., a bachelor, who attains twenty-five, is void for remoteness, and cannot take effect though a son of B. attains twenty-five in A.'s lifetime (*e*). It is submitted that the result must be the same where the first limitation (to A.) is in tail, and for the same reasons. Again, the devise of a reversion expectant upon an estate tail, to take effect upon failure of the issue of the tenant in tail generally, is void where the estate tail is not general (*f*). And a power affecting the settled lands, to arise upon a general failure of issue of the tenants in tail, of whom some were tenants in tail male, is void for remoteness (*g*). The limitation of a use, which, though barrable during the existence of a previous estate tail, may, if not barred, take effect after the determination of the estate tail, would seem to be equally void.

Limitations by way of executory, springing, or shifting use collateral to an estate tail and taking effect in defeasance of it. Name and arms clause.

(4.) Limitations by way of executory, shifting, or springing use collateral to an estate tail, and taking effect in defeasance of it.

The name and arms clause in an ordinary strict settlement of real estate, and the clause shifting an estate from a younger son, upon his acquiring the family estate or title, are instances of this class of limitations. The estates intended to be raised by these clauses are wholly in the power of each successive tenant in tail; and if the operation of the clauses is co-extensive only with the estates for

(*d*) In 2 Prest. on Abstr. 158, and in Lewis Perp., Suppl. 105, it is suggested that such a limitation becomes void after the determination of the estates tail, if it has not then taken effect; and in Butler's note, F. C. R. 522, cited above, p. 140, it is stated that a limitation to A. in tail, and if A. has no child who

attains twenty-seven, to B., is good. *See qu.*

(*e*) *Abbiss v. Burney*, 17 Ch. D. 211; 50 L. J. Ch. 348.

(*f*) *Banks v. Holme*, 1 Russ. 394, n.; *Lady Lanesborough v. Fox*, Ca. t. Talb. 262.

(*g*) *Bristow v. Boothby*, 2 S. & S. 465.

life and in tail created by the settlement, and which are themselves not too remote, there seems to be no reason for expressly restricting their operation within the legal period (*h*).

In *Nicolls v. Sheffield* (*i*) real estate was devised to A. for life, remainder to his first and other son successively in tail, remainder to B. for life, remainder to his first and other sons successively in tail. And there was a proviso that if A., or the heirs of his body, or B., or the heirs of his body, should become seised of certain other estates, the limitations of the will should cease, determine, and be void, and the estates should go the person next in remainder, as if the person so seised as aforesaid were dead. It was held by Sir Lloyd Kenyon, M.R., that there was no objection to the proviso on the ground of remoteness. "There is no doubt with respect to the validity of this proviso. Several estates are held under similar limitations. No rule of law is contradicted by it; and, if no recovery were suffered, it might take place at any distance of time. I might as well be told that an estate tail is an illegal estate, because it may endure for ever, and must, when the reversion is in the Crown" (*k*).

In *Harrison v. Round* (*l*) a similar clause in a strict settlement, carrying over estates limited to a younger son upon his succeeding to the family estate, was held to be valid.

But if a shifting clause of this character is so worded as to apply to every person taking under the settlement, including an ultimate remainderman in fee, it would seem to be void for remoteness, if not altogether, at least as to the remainder in fee. In *Bennett v. Bennett* (*m*) a shift-

(*h*) F. C. R. 276; and Butler's note, Co. Lit. 327, a.

(*i*) 2 Bro. C. C. 214.

(*k*) Per Sir Lloyd Kenyon, M.R., 2 Bro. C. C. 217.

(*l*) 2 D. M. & G. 190; 22 L. J.

Ch. 322; and see *Doe d. Lumley v. Earl of Scarborough*, 3 A. & E. 1, 897; *Carr v. Earl of Erroll*, 6 East, 58; 14 Ves. 478.

(*m*) 2 Dr. & Sm. 266; 34 L. J. Ch. 34.

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ing clause, annexed to an estate in fee which was preceded by a life estate, was held void for remoteness. The devise in that case was, in effect, to A. for life, remainder to her firstborn son in fee, with a shifting clause in case such son should not take the name of M. No time was specified within which the name was to be taken. The shifting clause was by Kindersley, V.-C., considered to be void for remoteness. "Now it is well settled that if there be a gift to A. for life, with remainder to B. in fee, with a shifting clause by which, in a certain event, the estate is to shift from B. to another, unless that clause must necessarily take effect within the prescribed limits, it is void for remoteness; although it is different when such a shifting clause is attached to an estate tail, because the power of barring the entail is a sufficient protection against perpetuity. So that, assuming the clause to import a condition subsequent, the shifting clause is void for remoteness" (n).

Estate tail determinable by limitation or condition subsequent.

An estate tail may, it seems, be limited so as to determine upon an event which may happen at any distance of time; and it is immaterial whether the limitation is conditional, and the estate tail determinable by its original constitution, or whether the limitation is absolute in the first instance and the estate tail is determinable by a condition subsequent. For in either case the condition or contingency upon which it is to determine can be barred by the tenant in tail (o).

Limitations taking effect under powers collateral to an estate tail.

(5.) As to limitations taking effect under powers collateral to an estate tail. The validity of these limitations depends upon that of the powers under which they are created—a subject considered in a subsequent chapter (p). The powers usually inserted in settlements of real estate, such as powers of sale and leasing, operate by way of shift-

(n) Per Kindersley, V.-C., 2 Dr. & Sm. 275. It had been argued that the clause as to taking the name constituted a condition sub-

sequent.

(o) *Benson v. Hodson*, 1 Mod. 111.

(p) *Infra*, p. 234.

ing use, and are paramount to the estates limited by the settlement (g). It seems, nevertheless, to be settled that, although their operation is not in terms limited in point of time, they are unobjectionable on the ground of remoteness. Their validity depends upon the view that they are, in their creation, co-extensive only with the purposes of the settlement; and that when those purposes are spent they come to an end by virtue of their original constitution. So long as there are purposes of the settlement unperformed, that is to say (in the case of an ordinary strict settlement of real estate), until the ultimate limitation in fee vests in possession, they are exercisable, but no longer (r). The practice of conveyancers, to limit the duration of the power of sale to lives in being and twenty-one years after, is due to abundant caution, and not to any well founded doubt as to the law (s).

Such powers, when unlimited, and not barred, seem to be valid and exercisable even beyond the line of perpetuity (t).

The validity of powers given to trustees, which are in effect trusts, to receive rents and manage estates during successive minorities of the tenants in tail, depends upon different considerations, and is considered elsewhere (u).

A power limited to arise upon an event which may not happen until after the failure or determination of an estate tail previously limited is too remote, and void (x).

(6.) There remains another class of limitations connected with estates tail, the validity of which has been much discussed; namely, dispositions by way of trust taking effect

Limitations of a term in priority to an estate tail

(g) See *Roper v. Halifax*, 8 Taunt. 845.

(r) See per Sir E. Sugden, 4 Dr. & W. 32, *Cole v. Sewell*; *Lantsbury v. Collier*, 2 K. & J. 709; 25 L. J. Ch. 672; *Peters v. Lewes, &c. Railway Co.*, 10 Ch. D. 703, 710; 44 L. T. N. S. 372; S. C. on app. 18 Ch. D. 429.

(s) 3 Dav. Prec. 3rd ed. 482, note.

(t) Sugd. Pow. 8th ed. 850; *Nicolls v. Sheffield*, 2 Bro. C. C. 214, 217; *supra*, p. 149.

(u) *Infra*, p. 244.

* (x) See *Bristow v. Boothby*, 2 S. & S. 465.

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 upon trusts to
 be executed
 after the expi-
 ration of the
 estate tail.
Case v.
Drosier.

out of an estate in the trustees which is anterior to the estate tail. Of these *Case v. Drosier* and *Turvin v. Newcombe* are the best known examples.

In *Case v. Drosier* (y) two estates were devised to trustees for a term of 500 years. Subject to the term, one of the estates was devised to A. for life, with remainders to his sons and daughters in tail, with remainder to B. for life, with similar remainders in tail to B.'s sons and daughters. The other estate was devised, subject to the term, in similar terms to B. for life, with remainders in tail to his sons and daughters, with remainder to A. for life, and after his death to his sons and daughters in tail. The trusts of the term were, amongst other things, in case A. or B. should die without issue, to raise and pay to C. and D. a sum of £2000. The question was whether the charge of the £2000 was valid or too remote. It was held by Lord Langdale, and on appeal by Lord Cottenham, that it was void for remoteness. The reason for this decision is thus stated by Lord Cottenham: "The appellant . . . argues that this is a legacy, charged upon the estate upon failure of an estate tail, which is not void for remoteness. But why is such a charge not void for remoteness? Merely because, being after an estate tail, it is barrable by a recovery, as was the case in *Morse v. Lord Ormonde* (z). But in this case the £2000 is charged upon, and is part of, a term anterior to an estate tail, and therefore not barrable by a recovery, but to be enjoyed only upon failure of the issue . . . (to whom the estates tail were limited). There is no gift of the £2000 except in declaring the trust of the term, and that term would not be affected by a recovery. *Eales v. Conn* (a), affirmed by the Lord Chancellor in 1831, is a distinct authority upon that point, which I have no disposition to disturb." So, in the Court below, Lord Langdale said that the failure of issue upon which the

(y) 2 Keen, 764; 5 M. & Cr.
 246; 6 L. J. Ch. 353.

(z) 5 Mad. 99; 1 Russ. 382.
 (a) 4 Sim. 65.

testator had directed the £2000 to be raised "might be at a very remote period, and there are no means by which the charges in this case could be barred; they depend on a term, and that term is precedent to the estates tail; so that after a recovery there would remain a term, and a trust to be performed—a trust which could not be defeated, and a term which cannot be destroyed" (*b*).

It might have been supposed that where the trusts of the term are such that they cannot arise if the estate tail is barred, their destructibility would save them from failure on the ground of remoteness. But it has been otherwise decided. In *Sykes v. Sykes* (*c*) the testator devised real estates to his eldest son, R., for life, with remainder to his grandson R. (son of R., the son) for life, with remainder to trustees to preserve, &c., with remainder to other trustees for a term of 500 years, with remainders to the sons of R., the grandson, in tail male, with remainder to the testator's second son N. for life, with remainder to trustees to preserve, with remainders to the sons of N. in tail male, with remainders to other sons of the testator successively for life, and their respective issue in tail, with remainders over. The trusts of the term of 500 years were, in case any one or more of the testator's younger sons, or their issue, should become seised in possession of the estates by virtue of the limitations in the will, to raise and pay £5000 to the testator's son or sons other than the son so seised, or their issue (by context meaning "children"), *per stirpes*, if dead. It was held by Wickens, V.-C., that the case was, in principle, not distinguishable from *Case v. Drosier*—"a case of the highest authority, from the care with which it was argued, and the judges by whom it was decided"—and that the charge of the £5000 was void for remoteness.

(*b*) See the dictum of Wickens, V.-C., as to the authority of this case, *infra*. (c) L. R. 13 Eq. 56; 41 L. J. Ch. 25.

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It will be seen that *Sykes v. Sykes* differed from *Case v. Drosier* in this, that in the former the trusts of the term were at the mercy of the tenant in tail, whereas in the latter they were not capable of being destroyed by a recovery or in any other way. In *Sykes v. Sykes* the charge, though not limited after an estate tail, so as to be barrable by a disentailing deed, could never arise if any of the estates tail limited to the sons of R., the grandson, were barred.

In consequence of the decision in *Sykes v. Sykes* it has been doubted (*d*) whether a trust, annexed to a term limited after the primary limitations in tail in an ordinary strict settlement, for raising additional portions on failure of the primary limitations in tail can be supported, unless the objects of the trust are ascertainable within lives in being and twenty-one years after. It would seem that, so long as the objects of a limitation in remainder after an estate tail are ascertainable immediately upon the determination of the estate tail, there can be no objection to the limitation on the ground of remoteness (*e*). Where the portions are raiseable for the daughters or younger children of the settlor, there can be no objection to the limitation of the portions on the ground of remoteness in the objects. Nor is the event upon which the portions are to be raised—the failure of issue of the preceding tenant in tail—too remote, since that is the event upon which the term arises out of which they are to take effect, and which is undoubtedly well created. It would seem that *Sykes v. Sykes* has no application where the term is subsequent in order of limitation to the estate tail, and therefore (together with the annexed trust) barrable by the tenant in tail (*f*).

(*d*) 4 Dav. Preced., 3rd ed., xlv.,
Corrigenda.

(*e*) See *Heasman v. Pearce*, L. R.
7 Ch. 275; 41 L. J. Ch. 705; *supra*,

p. 146.

(*f*) See Butler's note, Co. Lit.
272, a, and the cases next con-
sidered.

The considerations which establish the invalidity of the term in *Case v. Drosier* (*ubi supra*) seem to apply to the class of cases of which *Turvin v. Newcombe* is the most recent example. Cases, namely, where in a strict settlement of real estate there is a direction to the trustees, during the minorities of persons taking under the settlement, without limit as to time, to receive the rents and apply them otherwise than in accordance with the primary limitations (*g*). It is now settled that such a trust, though barrable by the successive tenants in tail, is void for remoteness. The reason appears to be that it takes effect, in order of limitation, not after, but before, the estate tail in respect of which the rents are received; that it takes effect by virtue of the estate limited to the trustees, which is antecedent to the estate tail (*h*). The disposition of the rents effected by the trust is, therefore, barrable only prospectively by a disentailing deed; and in this respect the case is the same as *Case v. Drosier*.

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Trusts, or powers in the nature of trusts, taking effect by virtue of an estate antecedent to the estate tail.

The earliest case upon this subject is *Lord Southampton v. Marquis of Hertford* (*i*). Estates were there conveyed to trustees in strict settlement, subject to a term limited upon trust that, during the minority of any person entitled in possession under the settlement for life or in tail to the settled estates, the trustees should receive and accumulate the rents, and hold the accumulations in trust for the person who upon the expiration of the minority or the death of the infant should be entitled to the rents and be of the age of twenty-one years. It was held that the trust of the term was altogether void for remoteness.

(*g*) In *Turvin v. Newcombe* the trust of the accumulated rents was for the tenant in tail, but this was held not to distinguish the case from those where it was not for the tenant in tail.

(*h*) See 1 Jarm. on Wills, 4th ed. 274, note; 3 Dav. Prec. 3rd ed. 466, note. As to the operation of a

power of sale in trustees after a recovery by tenant in tail, and during the life of tenant for life, see *Roper v. Hallifax*, 8 Taunt. 845; and, as to the operation of a shifting clause under similar circumstances, *Doe v. Earl of Scarborough*, 3 A. & E. 1; *ib.* 897.

(*i*) 2 V. & B. 54.

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This case was followed by *Marshall v. Holloway* (*k*). The testator there gave to trustees all his real and personal estate upon trust to convert the personalty, and after payment of debts and legacies, to accumulate the income of the real and personal estate as and when and during all such times as any person or persons beneficially interested under the trusts of the will should be under twenty-one, and upon trust to pay certain legacies; and subject thereto upon trust, as to the real and personal estate, for various tenants for life and their children in strict settlement. It was held by Lord Eldon that the trust for accumulation was void for remoteness.

The decisions in these cases have been considered to depend upon the fact that the trust of the accumulated fund was too remote (*l*). The true ground of the decision in each case was that the trust to accumulate was expressed to operate beyond the line of perpetuity, and was not within the protection of the estates tail (*m*).

In *Crosse v. Glennie* (*n*) it was held that a trust similar to that in the above-mentioned cases was valid; but the question of remoteness seems not to have been raised.

In *Browne v. Stoughton* (*o*) and *Turvin v. Newcombe* (*p*) there was a devise to trustees (*q*) upon trusts in strict settlement. The will in each case contained a direction to the trustees, during the minority of any person taking any estate or interest under the will, to accumulate the rents and hold them upon trusts declared concerning the lands

Browne v.
Stoughton.
Turvin v.
Newcombe.

(*k*) 2 Sw. 432. The same will came before the Court upon another point, *nom. Holloway v. Webber*, L.R. 6 Eq. 523; 37 L. J. Ch. 865; on app. *nom. Martelli v. Holloway*, L.R. 5 H. L. 532; 42 L. J. Ch. 26.

(*l*) See per Wigram, V.-C., *Ferrand v. Wilson*, 4 Ha. 344, 377; 9 Jur. O. S. 86; and per Parke, B., 12 Cl. & F. 610; Lewis Perp. Appx. 189.

(*m*) Sugd. Prop. 349; and as to

Marshall v. Holloway, L. R. 5 H. L. 540, per Hatherley, C.

(*n*) 2 Y. & C. C. C. 237; 7 Jur. O. S. 274.

(*o*) 14 Sim. 369; *nom. B. v. Houghton*, 15 L. J. Ch. 391.

(*p*) 3 K. & J. 16; 3 Jur. N. S. 203.

(*q*) This seems to have been the case in *Browne v. Stoughton*, but see *infra*, p. 157.

settled by the will. It was held by Wood, V.-C., in *Turvin v. Newcombe*, following *Marshall v. Holloway* (r), *Lord Southampton v. Marquis of Hertford* (s), and *Browne v. Stoughton* (t), that the trust for accumulation was void. "The trust," said Wood, V.-C., "is declared to arise during every successive tenancy in tail, and in this respect it is the same as *Marshall v. Holloway* and *Lord Southampton v. The Marquis of Hertford*. . . . There is a positive trust for accumulation fixed upon this property during the whole period while the successive *cestuis que trust* are under age; and it has been settled that this exceeds the limits which the law will permit for the duration of a trust."

In *Lewis on Perpetuities* (u) it is strongly urged that the decision in *Browne v. Stoughton* is inconsistent with the doctrine that limitations capable of being defeated by a tenant in tail under a previous limitation are not subject to the Rule against Perpetuities. Since the decision in *Turvin v. Newcombe* this contention cannot be supported. The true doctrine of these cases appears to be that the trust for accumulation is anterior to the estate tail in respect of which it is to be executed; that it is annexed to the fee, or to an estate in the trustees which precedes in order of limitation the estate tail; and that the trust is therefore indestructible, except as to its future operation, by the tenant in tail (x).

From a dictum of Wood, V.-C., in *Turvin v. Newcombe* it would seem to be immaterial whether the legal estate is limited to the trustees or not. But the Vice-Chancellor is in error in stating that in *Browne v. Stoughton* the legal estate was not vested in the trustees.

In *Lade v. Holford* (y), in a strict settlement, there was a

(r) 2 Sw. 432.

(s) 2 V. & B. 54.

(t) 14 Sim. 369; 15 L. J. Ch. 391.

(u) Suppl. p. 176, seq.

(x) See 3 Dav. Convey. 3rd ed.

467, note; 1 Jarm. on Wills, 4th ed. 274, note.

(y) 3 Burr. 1416; 1 W. Bl. 428; Amb. 479.

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proviso that certain persons named (who were the grantees to uses and trustees to preserve contingent remainders), and their heirs, should, so often as any tenant in tail should be under twenty-six, enter, receive the rents, accumulate so much of them as should not be required for the maintenance of the tenant in tail, and invest the accumulations in the purchase of lands to be settled to the uses of the will. The proviso was held void; but whether for remoteness or "repugnancy" does not clearly appear (z). By Lord St. Leonards the case is cited as an authority for the proposition that a power to raise a use which, if contained in the instrument creating the power, would tend to a perpetuity is void for remoteness (a). It is submitted that the case is one, not of a power, but of a trust; and that the trust is similar to that in the cases above mentioned—prior in order of limitation to the estate tail, and not barrable, except prospectively, by the tenant in tail.

Ferrand v. Wilson (b), fully stated elsewhere, is, it is submitted, a case of the same class.

In *Briggs v. Earl of Oxford* (c) there was, in a strict settlement of an equity of redemption of real estate by way of trust, a similar power for the trustees to cut timber so long as there should be any mortgage subsisting on the estate, the proceeds to be applied in payment of the mortgage. It was held that the power was not void for remoteness; but upon what ground does not distinctly appear. *Ferrand v. Wilson* was distinguished by Lord Cranworth on the ground that in the case before him "the person who enjoys the estate has only to pay off the incumbrance, and there is an end of it" (d). Lord

(z) See F. C. R. 530, Butler's note.

(a) Sugd. Pow. 8th ed. 31.

(b) 4 Ha. 344; 9 Jur. O. S. 860; *infra*, p. 244.

(c) 1 D. M. & G. 363; 21 L. J. Ch. 829.

(d) This is probably the true

ground of the decision; cf. *Bacon v. Proctor*, T. & R. 31; *Bateman v. Hotchkin*, 10 Beav. 426; 16 L. J. Ch. 514; *Lord Southampton v. Marquis of Hertford*, 2 V. & B. 54, 65. *Scarisbrick v. Skelmersdale*, 17 Sim. 187; 19 L. J. Ch. 126; is difficult to reconcile with these cases.

Justice Knight Bruce said that "the circumstance of the power being liable to destruction by the tenant in tail is of itself sufficient to preclude all objection, at least to a power of this description, on that ground" (of perpetuity).

The trust in *Meller v. Stanley* (e) appears to have been supported upon a principle similar to that of *Bateman v. Hotchkin* and *Briggs v. Earl of Oxford* (*ubi supra*); upon the ground, namely, that a trust which can be put an end to at any time by the owner of the fee is not obnoxious to the Rule against Perpetuities. The testator in *Meller v. Stanley*, being entitled to real estate, leaseholds for lives, and policies of insurance upon the lives, gave his real and personal estate to trustees, with a direction or power (held not to be discretionary) to keep up the policies, renew the lives as they dropped, and insure the new lives. And subject thereto he gave his real and personal estate to A. for life, with remainder to her first and other sons successively in tail. It was held that the trusts for renewal and keeping up the policies were valid; upon the ground, apparently, that the trusts could be put an end to by the first tenant in tail who would be entitled to the policies absolutely (f).

In *Floyer v. Bankes* (g) lands were limited by deed to trustees for a term of 500 years upon trusts thereafter declared; and subject thereto to the use of A. for life, remainder to his first and other sons in tail, remainder to B. for life, remainder to his first and other sons in tail, with remainders over. Then followed a clause declaring that the trustees might enter and manage the estates during the minority of any person who should, from time to time, be entitled to the immediate freehold as tenant for life or in tail under the limitations of the settlement. The clause

(e) 2 D. J. & S. 183; 12 W. R. 524, 780.

(f) In the opinion of Knight Bruce, L.J., the case "is one which

presents only a choice of difficulties."

(g) L. R. 8 Eq. 115; 3 D. J. & S. 306.

Chap. VII. empowering the trustees to enter was held void for remoteness (*h*); upon the ground, apparently, that it was a trust annexed to the term which was antecedent to the estate tail.

Lord Southampton v. Marquis of Hertford, *Marshall v. Holloway*, and *Turvin v. Newcombe*, all cited above, show that a trust expressed to operate upon the rents of real estate during the successive minorities of the tenants for life and in tail in a strict settlement is void altogether, and not only as to those tenants in tail who are beyond the line of perpetuity (*i*). In these cases the form in which the trust is expressed, rather than its intention or scope, determines its validity, or otherwise, with regard to the Rule against Perpetuities. In *Turvin v. Newcombe*, for example, the nature of the trust was such that it could operate only upon the life interest of the first tenant for life under the settlement; yet it was held void for remoteness, because it was expressed to operate upon the tenancies in tail without limit. So also in *Sykes v. Sykes*, above mentioned (p. 153), it was held void for remoteness, although the trust could never arise if the estate tail was barred.

In *Mainwaring v. Baxter* (*k*) a term of 1000 years was limited to trustees, and after the determination thereof the lands were limited to a tenant for life, with remainder to his sons successively in tail. The trusts of the term were, upon alienation by any tenant in tail, to raise £5000 for the benefit of the person next in remainder. The trusts of the term were declared void as tending to a perpetuity and inconsistent with the rights of the tenant in tail (*l*), and the decree directed the term to be assigned to the tenant in tail.

(*h*) This was not necessary for the decision.

(*i*) And see the observations of Turner, L.J., in *Meller v. Stanley*, 2 D. J. & S. 183, 191. But see *infra*, p. 315, as to accumulation under 44 & 45 Vict. c. 41, s. 42.

(*k*) 5 Ves. 457.

(*l*) The former of these grounds appears to be the true reason of the invalidity of the trusts; see F. C. R. 530, Butler's note on *Lade v. Holford*.

A term limited in remainder after an estate tail is, like any other limitation in remainder after an estate tail, free from objection on the ground of remoteness. But the trusts of a term so limited in remainder may be void for remoteness; as, for example, where they are for the benefit of persons not ascertained at the failure or determination of the estate tail. Where some of the trusts are good, and others void for remoteness, a devisee of the lands in which the term is created takes subject to the term. Nor is the devisee entitled to the benefit of the trusts of the term so far as they are void for remoteness. The limitation of the term is valid, and the term is well created; the benefit of the trusts, so far as they are void for remoteness, results to the heir at law as a chattel interest carved out of the real estate and undisposed of by the will. Such appears to be the effect of the decision of the House of Lords in *Tregonwell v. Sydenham* (m). In that case the testator devised lands (at B.) to his son for life, with remainders to the son's sons successively in tail male, with remainders to other sons of the testator in tail male; and in case there should be no such issue male of the testator's body, or the same should become extinct, to trustees for a term of sixty years upon trust to receive and accumulate the rents to the amount of £20,000, which sum the testator directed should be applied in the purchase of lands to be settled upon the person who, under limitations contained in the will of other estates (at A.), should then be in possession of such other estates, for life, with remainders over. And after the £20,000 should be raised, or the determination of the term, the testator devised the lands at B. to the use of his brother for life, with remainders to his sons in tail male. There was a failure of

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Limitation of a term of years in remainder after an estate tail upon trusts that are too remote.

(m) 3 Dow. 194. This decision has been doubted by Lord St. Leonards, *Law of Property*, p. 362; and see *Mainwaring v. Baxter*, 5

Ves. 457; *Baker v. Hall*, 12 Ves. 497; as to the effect of remoteness upon the right of the heir to the term.

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If the trusts of the term so limited in remainder after an estate tail are declared to arise upon failure of issue inheriting under the estate tail, they will not the less be valid (*o*). Whether so expressed or not, they could not be executed before that event, which marks also the commencement of the term to which they are annexed; and they, together with the term itself, are barrable by the tenant in tail from the moment the estate tail vests.

(*n*). This appears to have been the case, though it is not so stated in the report. (*o*) *Morse v. Lord Ormonde*, 5 Mad. 99; 1 Russ. 382

CHAPTER VIII.

APPLICATION OF THE RULE AGAINST PERPETUITIES TO
LEGAL AND EQUITABLE LIMITATIONS OF REAL ESTATE
BY WAY OF REMAINDER.

THE question has been much discussed (*a*) whether the Rule against Perpetuities applies to limitations of real estate by way of legal remainder. In *Cole v. Sewell* (*b*) Sir E. Sugden expressed a strong opinion that the Rule is not applicable to remainders. The devise in that case, so far as need here be stated, was to the testator's daughters for their lives, with remainders to their sons in tail male, with remainders to their daughters in tail, with a remainder over if the testator's daughters should die without issue generally. It was contended that the ultimate remainder was void for remoteness. Sir E. Sugden said (*c*): "As to the question of remoteness at this time of day I was very much surprised to hear it pressed upon the Court, because it is now perfectly settled that where a limitation is to take effect as a remainder remoteness is out of the question: for the given limitation is either a vested remainder, and then it matters not whether it ever vest in possession, because the previous estate may exist for centuries or for all time; or it is a contingent remainder, and then, by the rule of law, unless the event upon which the

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 Dictum of Sir
E. Sugden in
Cole v. Sewell.

(*a*) See Lewis on Perp., App., 97—153; 1 Jarman on Wills, 4th ed. 255, *seq.*, and Appendix A.

(*b*) 4 Dr. & War. 1; 2 Con. & L. 344; 2 H. L. C. 186, 230.

(*c*) 4 Dr. & War. p. 28.

Chap. VIII. contingency depends happen so that the remainder vest *eo instanti* the preceding limitation determines, it can never take effect at all. There was a great difficulty in the old law, because the Rule as to Perpetuity, which is a comparatively modern rule (I mean of recent introduction when speaking of the laws of this country) was not known, so that while contingent remainders were the only species of executory estate then known, and uses and springing and shifting limitations were not invented, the law did speak of remoteness and mere possibilities as an objection to a remainder, and endeavoured to avoid remote possibilities; but since the establishment of the Rule as to Perpetuities this has long ceased, and no question now ever arises with reference to remoteness; for if a limitation is to take effect as springing, shifting, or secondary use, not depending on an estate tail, and if it is so limited that it may go beyond a life in being and twenty-one years and a few months equal to gestation, then it is absolutely void; but if, on the other hand, it is a remainder it must take effect, if at all, upon the determination of the preceding estate. In the latter case the event may or may not happen before or at the instant the preceding estate is determined, and the limitation will fail or not according to the event. It may thus be prevented from taking effect, but it can never lead to remoteness. That objection therefore cannot be sustained against the validity of a contingent remainder" (d).

It will be seen that the opinion here expressed by Sir E. Sugden, that a contingent remainder cannot be void for remoteness, was not necessary for the decision of the case. The limitation under consideration in *Cole v. Sewell* was clearly not obnoxious to the Rule against Perpetuities, since it must have vested, if at all, either during the con-

(d) See Sugden's Real Property, 120, and *Monypenny v. Dering*, 2 D. M. & G. 168, for some observa-

tions by Lord St. Leonards upon *Cole v. Sewell*.

tinuance, or immediately upon the determination of, the previous estates for life and in tail limited to the testator's daughters and grandchildren respectively.

To remainders so limited it is clear that the Rule can have no application. If the particular estate is an estate for life and the tenant for life is a person living at the date of the limitation, the remainder must vest, if at all, at the termination of a life in being. Thus in *Doe d. Winter v. Perratt (e)* there were limitations to living persons successively for life (*f*), with remainder to the first heir male of a specified family. No question was raised as to the validity of the limitation to the heir male; the dispute being as to who answered the description.

The Rule does not apply to remainders expectant upon estates for life or in tail limited to ascertained persons.

If the particular estate is an estate tail, the remainder is outside the scope of the Rule against Perpetuities; for this reason, that its existence in no way prevents the alienation of the fee. Whether vested or contingent, the remainder is at the mercy of each successive tenant in tail, and, like an executory limitation collateral to or taking effect upon the determination of an estate tail (*g*), it is for that reason free from objection on the ground of remoteness.

The case of a remainder preceded by an estate for life limited to a living person, and also by an estate tail limited in remainder after the life estate, is the same. The ultimate remainder is destructible, and the fee alienable, at latest, twenty-one years after the death of the tenant for life. If the remainder in tail is vested the fee is alienable forthwith; if contingent, it must vest, if at all, at latest, upon the death of the tenant for life; and supposing it to vest then in an infant, that infant will be able to disentail and dispose of the fee at latest twenty-one years after the death of the tenant for life. The same observations apply

(e) 5 Barn. & Cr. 48; 3 M. & Scott, 586; 7 Scott, N. R. 1; 9 Cl. & F. 606.

(f) It was so assumed, though it

may be doubted whether there was not, in fact, an estate tail preceding the limitation to the heir male.

(g) As to these, see p. 148, *supra*.

Chap. VIII. where the remainder is preceded by a series of similar estates for life and in tail.

The Rule applies to a remainder expectant upon an estate for life limited to an unborn person.

A difficulty arises where one of the estates prior to the remainder in question is an estate limited to a person not necessarily to be born or ascertained within the legal period, and where the remainder does not necessarily vest before the expiration of that estate, or within the legal period. For example, a limitation to A. for life, remainder to A.'s unborn son for life, remainder to the person who at the death of A.'s son is in possession of a specified estate. The rule of law which requires a remainder to vest at or before the determination of the particular estate does not preclude remoteness in such a case. Until the death of A.'s unborn son no person is ascertained in whom the fee can vest. In such a case it would seem, notwithstanding the language of Sir E. Sugden in *Cole v. Sewell*, that there is no reason for excluding the remainder from the operation of the Rule against Perpetuities. And in *Catlin v. Brown* (*h*) Wood, V.-C., expressed an opinion to this effect: "I apprehend, however, that a contingent remainder cannot be limited as depending on the termination of a particular estate whose determination will not necessarily take place within the period allowed by law."

Argument derived from the existence of the *cy près* doctrine.

It has been said that the existence of the *cy près* doctrine is conclusive proof that the Rule against Perpetuities applies to remainders (*i*). That doctrine is founded upon the assumption that limitations by way of remainder to successive generations of unborn issue are invalid beyond the first of such limitations. But, as will appear below, there is reason to think that the illegality in such a scheme of limitation rests upon grounds distinct from the Rule against Perpetuities.

Can a remainder be limited

Whether remainders are subject to the Rule against Perpetuities or not, there is considerable authority for the

(*h*) 11 Ha. 372, 374; 1 W. R. 533.

(*i*) See Lewis on Perp. App. 140, *seq.*

opinion that they are subject to another and a stricter rule to this effect: that real estate cannot be limited to the child of an unborn person by way of remainder following a limitation to the parent for life. Whether the limitation to the child of the unborn person be for life or otherwise would seem to be immaterial; though the rule is sometimes referred to as forbidding the creation of successive life estates to successive unborn classes of issues (*k*). This rule is recognised by Lord St. Leonards (*l*), and he has stated that nothing said by him in *Cole v. Sewell* was intended to touch it (*m*). It has been said to lie at the root of the Rule against Perpetuities (*n*). If such a rule exists it would prevent the following limitation:—To A. for life, remainder to his first unborn son for life, remainder to the first son of such unborn son who shall be born in the lifetime of A. in tail. But in *Cattlin v. Brown* (*o*) Wood, V.-C., appears to have considered that such a limitation would be valid. In the absence of a direct decision upon the point the question must be considered as open. There seems no doubt that a similar limitation of personalty would be valid, and the Courts are unwilling, at the present day, to multiply distinctions between limitations of real and personal property. It seems probable that, when a decision upon the point is called for, the opinion expressed by Wood, V.-C., in *Cattlin v. Brown* will be followed.

A third question arises with regard to the application of the Rule against Perpetuity to remainders. Are limitations of the equitable interest in real estate by way of remainder—so-called equitable remainders—subject, as regards remoteness, to the rules which govern legal remainders? Or are they subject to those rules which apply

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to the unborn son of an unborn person?

(*k*) See Sugd. R. P. 120.

(*l*) And by Mr. Joshua Williams; see Williams' Real Prop. 12th ed. 274, note (*m*).

(*m*) In *Monypenny v. Dering*, 2

D. M. & G. 145, 168; 22 L. J. Ch. 313.

(*n*) 3 Dav. Preced. Pt. I. 3rd ed. 270.

(*o*) 11 Ha. 372, 375; 1 W. R. 533.

Chap. VIII. to limitations of personalty and executory limitations of real estate? There seems to be no doubt that for this purpose equitable remainders are to be considered, not as remainders, but as executory limitations. This follows from the consideration that the reason for excepting certain legal remainders from the operation of the Rule does not exist in the case of equitable limitations. That reason is supplied by the rule of law which requires a legal remainder to take effect, if at all, at or before the expiration of the particular estate. The rule does not exist in the case of equitable limitations. "Where the legal fee is devised to, or vested in, trustees in trust, there is no necessity for any preceding particular estate of freehold to support contingent limitations, for that legal estate in the general trustees will be sufficient for the purpose; and consequently, in such cases, it is not necessary that a contingent remainder should vest by the time the preceding trust limitation expires" (*p*).

In a recent case (*q*) the testator devised freeholds to trustees upon trust during the life of A. to retain the rents and profits to their own use, and upon trust after A.'s death to convey the freeholds to the first son of B. who should attain twenty-five. A son of B. first attained twenty-five after the testator's death and in A.'s lifetime. It was held by the Court of Appeal, reversing the decision of Malins, V.-C., that the devise to the son of B. was void for remoteness. All the members of the Court of Appeal (Jessel, M.R., Cotton and Lush, L.JJ.) were agreed that the reason for excepting legal remainders from the operation of the Rule against Perpetuities does not exist in the case of an equitable remainder. As to whether, in the case before them, the limitation to the son of B. was an equitable remainder or an executory limitation, there seems to have been a difference of opinion. Jessel, M.R.,

(*p*) F. C. R. 303, 304.

17 Ch. D. 211; 50 L. J. Ch. 348.

(*q*) *In re Finch, Abiss v. Burney*,

and Cotton, L.J., held that it was an executory limitation; so that the case does not conclude the question as to the application of the Rule against Perpetuities to equitable remainders. But the reasoning upon which the unanimous opinion of the Court upon that question is founded is unanswerable; and that opinion would, it is submitted, be followed in a future case (r).

It will be observed that the remarks and the decision in *In re Finch* apply to a case when the legal estate is vested in trustees under the instrument which creates the equitable interest. It is submitted that the same rules as regards remoteness would apply where the legal estate is outstanding under an instrument other than that creating the equitable remainder in question; that, for example, the devise of an equity of redemption of real estate to A. for life, and after his death to his first unborn son who attains twenty-two, would be void for remoteness. It has been doubted whether, in such a case, apart from the question of remoteness, the limitation to the son would take

Equitable limitation by way of remainder when the legal estate is outstanding under another instrument.

(r) In the Court below, the Vice-Chancellor, holding the limitation to the son of B. to be valid, mainly relied upon *Hopkins v. Hopkins* (West, 606; the case is also stated very fully in all its stages in Butler's note Co. Lit. 272, a. The report of the case in *Atkins* is incorrect, see 2 Ves. 237, a), which case he considered as deciding that "the doctrine of contingent remainders is just as applicable to equitable estates as to legal estates"—the doctrine intended being (it seems) that which requires every limitation capable of taking effect as a remainder to take effect as a remainder rather than as an executory limitation. Assuming, therefore, that the limitation to the son of B. in *In re Finch* was a remainder, and must, by the law of its existence, vest at latest at the death of A., he held that the Rule against Perpetuities did not apply. In *Hopkins v. Hopkins* Lord Hardwicke does appear to

have considered that an equitable limitation by way of remainder must be supported in the same way as a legal remainder; that the limitations in question in *Hopkins v. Hopkins* were so supported by an implied trust for that purpose annexed to the legal estate limited to trustees; and that therefore they must take effect as remainders, and not as executory limitations. Fearn (F. C. R. 304, 525) acquiesces in this view, which is supported also by Lord Ellenborough, C.J., in *Roe v. Briggs*, 16 East, 406, 413. But the more correct doctrine seems to be that adopted by modern authorities (1 Hayes' Convey. 5th ed. 84; 3 Dav. Preced. 3rd ed. 340, and authorities there cited) that equitable limitations by way of remainder—the so-called equitable remainders—are not in fact remainders at all, but are, at least for the purposes of the Rule against Perpetuities, executory limitations.

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effect, if no son had attained twenty-two at A.'s death (s). In *Astley v. Micklethwaite* (t) Malins, V.-C., held that a devise of an equity of redemption in real estate to the use of A. for life, and after his death to the use of the children of A. who should attain twenty-one, took effect in favour of children who were infants at A.'s death, as well as children who attained twenty-one in A.'s lifetime. If the age had been twenty-two, it follows from the decision in *In re Finch* that the entire gift would have been void for remoteness, both as to children attaining the specified age in A.'s lifetime and those attaining twenty-one after his death.

But where an unprotected contingent remainder is clearly legal the Court will not, merely in order to preserve it from destruction, hold the legal fee to be in a devisee to uses, or in trustee to whom a previous legal estate for life or years is limited (u). The same rule would apply where the only reason for construing the remainder to be legal is, that otherwise it must fail for remoteness (x).

Equitable
limitations by
way of re-
mainder ex-
pectant upon
an estate tail.

Equitable limitations by way of remainder after an estate tail are, in respect of remoteness, in the same position as other executory limitations connected with estates tail. Unless the event upon which the limitation is to take effect is such that it must happen at or before the expiration of the estate tail, the limitation is void for remoteness. The fact that such an equitable remainder may be barred during the existence of the estate tail does not make the application of the Rule against Perpetuities unnecessary. For if the estate tail is not barred the equitable remainder will take effect as an executory limitation, either at the expiration of the estate tail or upon

(s) See 3 Dav. Prec. 3rd ed. 340;
Butler's note (m) F. C. R. 305;
Lewis on Perp. 425.

(t) 15 Ch. D. 59; and see F. C. R.

320, Butler's note (e).

(u) *Cunliffe v. Brackner*, 3 Ch.
D. 393; 46 L. J. Ch. 128.

(x) See 3 Ch. D. 399.

the happening of the event specified in the limitation at any distance of time afterwards. Thus, in *Cole v. Sewell*, if the limitations had been equitable, and the issue in tail male had come to an end without the estates in tail male having been barred, the ultimate limitation upon a general failure of issue might (but for the Rule against Perpetuities) have taken effect at any distance of time after the expiration of the estates tail, and during the whole of this time the fee would have been inalienable.

Contingent remainders of copyholds appear to be in the same position, as regards remoteness, as remainders of freeholds. Although they will take effect after the determination of the particular estate by forfeiture or merger, they will not, it seems, take effect after the determination of the particular estate in its regular course, that is to say after the death of the tenant for life, or failure of the issue in tail, as the case may be (y). The recent Act, 40 & 41 Vict. c. 33, does not affect them upon the question of remoteness.

Limitations of an estate *pur autre vie*, whether by way of remainder or otherwise, are, probably, outside the scope of the Rule against Perpetuities. If, however, it should be held that the Rule does apply to them, no distinction, upon the question of remoteness can be drawn between a contingent remainder of an estate *pur autre vie* (z) and a remainder of freeholds or copyholds.

A recent case (a) may here be mentioned which may have the effect of making void for remoteness a class of limitations which, as remainders, would be valid. A testatrix devised freeholds to A. for life, and from and after her death, to such of her children living at her death

(y) F. C. R. 320; Gilbert on Tenures, 266; *Pikersgill v. Grey*, 30 Beav. 352; 31 L. J. Ch. 394.

(z) As to these see *Pikersgill v.*

Grey, *ub. supra*; and *Allen v. Allen*, 2 Dr. & War. 307.

(a) *In re Lechmere & Lloyd*, 18 Ch. D. 524.

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as either before or after her death should, being males, attains twenty-one, or, being females, marry under twenty-one, with a gift over if there should be no such children. A. survived the testatrix, and died leaving seven children, of whom two were infants and unmarried at her death. It was held that the gift to the children was not a remainder but an executory devise, and that the class to take consisted of such of the seven children as should attain twenty-one or marry. This case is in direct conflict with a previous decision of Hall, V.-C., *Brackenbury v. Gibbons* (b); and until the Court of Appeal overrules one case or the other, the validity of a devise to A. for life, and after his death to such of his children as either before or after his death attain twenty-two, must remain uncertain. There seem to be strong grounds for preferring the decision in *Brackenbury v. Gibbons*; which would give effect to the devise above suggested. If the decision of Jessel, M.R., in *In re Lechmere and Lloyd*, is correct the devise would fail for remoteness; unless the doctrine of *Evers v. Challis* (c) could be applied, so that the devise would take effect as a remainder in the event of all A.'s children attaining twenty-two in his lifetime, and in the alternative event would fail for remoteness.

40 & 41 Vict.
c. 33.

The recent Act, 40 & 41 Vict. c. 33, giving effect to certain contingent remainders where the particular estate determines before the remainder vests "as if the contingent remainder had been created as a springing or shifting use or executory devise or other executory limitation" does not appear to touch the question of remoteness. The Act applies only to a contingent remainder "which would have been valid as a springing or shifting use or executory devise or other limitation had it not had a sufficient estate to support it as a contingent remainder." A

(b) 2 Ch. D. 417.

(c) 7 H. L. C. 531; 20 L. J. Q. B.

113; 21 L. J. Q. B. 227; 29 L. J. Q. B. 121.

contingent remainder, therefore, which as an executory limitation would be void for remoteness—as a limitation by way of remainder to the first son of A. who attains twenty-two—notwithstanding the recent Act, fails to take effect if no son of A. attains twenty-two before the determination of the particular estate. Chap. VIII.

CHAPTER IX.

LIMITATIONS TO UNBORN PERSONS FOR LIFE WITH
REMAINDER OVER.

Chap. IX. A LIMITATION of real or personal property to an unborn person for life is valid provided it must vest, if at all, within the legal period (a). Nor is it necessary to its validity that the interest in remainder should be so limited as to vest at the same time as the life interest; or so as to vest within any specified time. Remoteness in the limitation in remainder does not affect the previous limitation for life.

Limitation to an unborn person for life is valid provided it must vest, if at all, within the legal period.

Whether the interest in remainder vests at the same time or not.

In *Hayes v. Hayes* (b) it was said that a limitation for life to an unborn person is void unless the remainder vests in interest at the same time (c). And the remainder being clearly void for remoteness in that case, the life interest also was held to be void. So far as it decides that the life interest (which was limited to children of the testator's children) was void for remoteness *Hayes v.*

(a) *Cotton v. Heath*, 1 Rolle Abs. 612; 1 Eq. Ca. Abr. 191; *Routledge v. Dorvil*, 2 Ves 357, 366 a.; *Burley v. Evelyn*, 16 Sim. 290; 12 Jur. O. S. 712; *Hay v. Earl of Coventry*, 3 T. R. 83; *Brudenell v. Elwes*, 1 East, 442; 7 Ves. 382; *Boughton v. James*, 1 Coll. 36, 46; *Beard v. Westcott*, 5 Taunt. 393; 5 B. & Ald. 801; *Gooding v. Read*, 4

D. M. & G. 510; *Erans v. Walker* 3 Ch. D. 211; 25 W. R. 7; *Goodier v. Johnson*, 18 Ch. D. 441; 51 L. J. Ch. 369; *In re Roberts, Repington v. Roberts-Gawen*, 19 Ch. D. 520; 50 L. J. Ch. 265.

(b) 4 Russ. 311.

(c) See also per Sir R. P. Arden, M.R., *Routledge v. Dorvil*, 2 Ves. 356, 366.

Hayes is not law. It is contrary to several of the cases cited above, and has been repeatedly disapproved (*d*). Chap. IX.

The limitation in remainder after a life interest limited to an unborn person is valid, provided the person or class to take is ascertained at the date of the limitation, or within the legal period (*e*). If the person or class to take in remainder is unascertained until the death of the tenant for life, the limitation in remainder will fail for remoteness (*f*). An example of this occurs where a testator gives to his unmarried child for life, with remainder to the child's future husband or wife for life, with remainder to the child's children then living, or other persons to be then ascertained. The future husband or wife may be a person who is unborn at the testator's death; and a limitation which will not vest until the death of such a person is void for remoteness (*g*).

So if the limitation in remainder is contingent upon an event to be ascertained at the death of the unborn tenant for life, it will fail for remoteness. Thus a limitation to the eldest son of A., a bachelor, for life, remainder to the eldest son of such son in fee, if any such be living at the death of the tenant for life, and if none, to the second son of A. in fee, is void for remoteness as to the remainder to the second son of A. (*h*). A limitation to a class of unborn persons for life as joint tenants, or as tenants in common, is valid; and the property may be limited after the death of the survivor to a person in existence at

Limitation to in remainder expectant upon the death of unborn tenant for life.

(1) To a person ascertained within the legal period.

(2) To a person to be ascertained at the death of the tenant for life.

(*d*) *Williams v. Teale*, 6 Ha. 239; and see 1 Coll. 37, by Sir J. Leach, who decided *Hayes v. Hayes*. See also *Gooding v. Read*, 4 D. M. & G. 510; *Gooch v. Gooch*, 14 Beav. 565; 3 Sm. & G. 366; 21 L. J. Ch. 238; 22 L. J. Ch. 1089. In *Hampton v. Holman*, 5 Ch. D. 183; 46 L. J. Ch. 248, Sir G. Jessel disapproved of it.

(*e*) See cases above cited.

(*f*) See *In re Roberts, Repington v. Roberts-Gawen*, 19 Ch. D. 520;

50 L. J. Ch. 265; *Goodier v. Johnson*, 18 Ch. D. 441; 51 L. J. Ch. 369; where this was assumed.

(*g*) *Hodson v. Ball*, 14 Sim. 558; *Lett v. Randall*, 3 Sm. & Gif. 83; 24 L. J. Ch. 708; *Buchanan v. Harrison*, 1 J. & H. 662; *In re Merrick's Trust*, L. R. 1 Eq. 551; *Goodier v. Johnson*, 18 Ch. D. 441; 51 L. J. Ch. 369.

(*h*) *D'Abbadie v. Bizoin*, 5 Ir. Rep. Eq. 205.

Chap. IX. the date of the limitation (i), or ascertained within the legal period.

That real and personal property may be well limited in remainder after the death of an unborn tenant for life is a corollary from the proposition that a limitation to an unborn person for life is not void for remoteness. Otherwise the property would be inalienable during the lifetime of the tenant for life. But a limitation to A., a person in existence at the date of the limitation, upon the death of an unborn person who takes no life interest, unless it is so expressed that it must take effect, if at all, within the legal period, is void for remoteness. The fact that the person upon whose death the limitation takes effect is a person to whom a life interest might have been well limited is, it is submitted, immaterial.

A limitation to an unborn person for life being valid, it follows that a life interest determinable upon marriage, or other event happening in the lifetime of the tenant for life, may be limited to an unborn person; and that a limitation of the interest in remainder will be valid, provided it vests within the legal period. Whether a life interest so limited to an unborn person may be determinable by a condition subsequent, as well as by the terms of the original limitation has not been expressly decided. In two recent cases it appears to have been assumed that a life interest absolute in the first instance could be determined by a subsequent and distinct clause of forfeiture (k), but the point was not expressly decided.

In one of these cases, *Hodgson v. Halford*, the life interest was first given absolutely, and by a subsequent and distinct limitation it was provided that upon the marriage of the tenant for life the life interest should be

(i) *In re Roberts, Repington v. Roberts-Gawen*, 19 Ch. D. 520; 50 L. J. Ch. 265; as to tenancy in common see the cases cited below.

(k) *Hodgson v. Halford*, 11 Ch.

D. 959; 48 L. J. Ch. 548; *In re Roberts, Repington v. Roberts-Gawen*, 19 Ch. D. 520; 50 L. J. Ch. 265.

forfeited and the property go over to a class to be then ascertained. It was held by Hall, V.-C., that the forfeiture clause could not be construed apart from the gift over; and, the gift over being too remote, that the forfeiture clause did not take effect (*l*).

A trust for the benefit of an unborn person until he attains a given age is good, provided the *cestui que trust* is ascertained within the legal period; but a trust upon his attaining the given age for a person or class to be then ascertained is void for remoteness. Thus in *Gooding v. Read* (*m*) a trust to maintain the children of a living person (tenant for life) until the youngest attained twenty-five was held valid; and a trust, upon the youngest child attaining twenty-five, to sell and divide amongst the children then living and the issue of children then dead, was held void for remoteness.

There is some doubt whether a restraint upon anticipation can be attached to a life interest limited to an unborn female. It has been held void for remoteness in several cases, and until these cases are overruled they must be taken to settle the law; but they have been doubted in a recent case by Jessel, M.R., who, however, considered them binding on him, and followed them (*n*).

In the case of a limitation to unborn persons as tenants in common for life, with cross remainders between them for life, or with benefit of survivorship, it has been held that the benefit of survivorship is not too remote. In *Ashley v. Ashley* (*o*) it was so held, but the question of remoteness does not appear to have been discussed. This

Cross remainders amongst a class of unborn tenants for life.

(*l*) *Sed quære*, see *supra*, p. 82; and see also *Boughton v. James*, 1 Coll. 26, 46.

(*m*) 4 D. M. & G. 510.

(*n*) See *In re Ridley*, *Buckton v.*

Hay, 11 Ch. D. 645; 48 L. J. Ch. 563, *nom. Buckton v. May*; see p. 282, *infra*.

(*o*) 6 Sim. 358; 3 L. J. Ch. 61,

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case was doubted by Malins, V.-C., in *Stuart v. Cockerell* (p). In *Gooch v. Gooch* (q) Lord Cranworth said that a trust in favour of all the testator's grandchildren born at and after his death, for their lives, with benefit of survivorship, would be valid. The dictum, however, was not necessary for the decision of the case; and the reason given for supporting such a limitation, namely, that the children and the remainderman could together alienate the fee, is of doubtful validity (r).

Limitation to the survivor of a class of unborn tenants for life.

In *Avern v. Lloyd* (s) there was a bequest to A. for life, and after his death to his issue for their lives and the life of the survivor as tenants in common, and after the death of the survivor to the executors, administrators and assigns of the survivor of A. and his issue. Stuart, V.-C., held that the gift to the survivor was valid on the ground that the words "executors, administrators and assigns" were words of limitation, and that the gift to the executors, administrators and assigns of the surviving tenant for life attached to the life estates, so as to give a contingent absolute interest to each tenant for life, which was alienable within the legal period (t).

There is some difficulty in reconciling these decisions with the cases stated above, in which a limitation in remainder after a life interest limited to an unborn person has been assumed or held to be void for remoteness, unless it vests within the legal period. Benefit of survivorship amongst tenants in common is different in character from that enjoyed by joint tenants. The latter is an incident of the estate or interest of every joint tenant;

(p) L. R. 7 Eq. 363, 370; 39 L. J. Ch. 729.

(q) 3 D. M. & G. 366, 383; 22 L. J. Ch. 1089.

(r) See *supra*, p. 51.

(s) L. R. 5 Eq. 383; 37 L. J. Ch. 489.

(t) See observations of Malins,

V.-C., on this case, L. R. 7 Eq. 368. As to alienation of a contingent interest where the contingency is too remote, see *supra*, pp. 57, 66. As to a gift to the survivor of a class, see *Lachlan v. Reynolds*, 9 Ha. 796.

and it is clear that property may be limited to a class of unborn persons as joint tenants for life (*u*), and that the survivors will enjoy the benefit of survivorship which is incident to the joint tenancy. But benefit of survivorship between tenants in common is created only by express limitation; and it is an interest which vests when the survivor is ascertained, and not before. It is submitted that, notwithstanding the decision in *Ashley v. Ashley*, the question as to the validity of "benefit of survivorship" between unborn tenants for life is not free from doubt.

In *Cooke v. Bowler* (*x*) the testator gave the dividends of stock in trust for his brother and sisters by name for their lives in equal shares; and after the death of any of them leaving children, the share of him or her so dying was to be paid to such children for their lives as tenants in common with benefit of survivorship amongst them; and in case the brother or any of the sisters should die without leaving children, the survivor or survivors of the brother and sisters were to take the dividends; and after the death of the survivor of the children of the brother and sisters the stock and dividends then due were to be disposed of according to the Statutes of Distributions. The ultimate gift of the stock and dividends was held void for remoteness. It does not clearly appear on what ground the decision was based. The argument was that a gift in remainder after a life interest in an unborn person is too remote. This, we have seen, is not necessarily the case. The decision is right if the class of next of kin to take under the ultimate gift was not ascertainable until the death of the survivor of the children (*y*). And it could, perhaps, be supported also on the ground that the ultimate gift was void, not as being in itself too

(*u*) *In re Roberts, Repington v. Roberts-Gawen*, 19 Ch. D. 520; 50 L. J. Ch. 265.

(*x*) 2 Keen, 54; 5 L. J. Ch. 250.

(*y*) For which construction, however, there seems no ground.

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In *Garland v. Brown* (z) there was a gift of rents of real estate to the survivor of the testator's children for life, with remainder to the children of such surviving child as tenants in common for life; and in case there should be only one, or all but one should die, then upon trust to convey the fee to such one child or to such surviving child. The gift of the fee was held void for remoteness. This case illustrates the rule, stated elsewhere (a), that a gift to the survivor of a class, or to such of a class as shall be living at a specified time, vests when the survivor is ascertained or the time arrives.

Limitation of real estate by way of remainder to the child of an unborn tenant for life.

There is some doubt whether real estate can be limited for life or otherwise to the child of an unborn person by way of legal remainder expectant upon an estate for life limited to the parent (b). And it has been said that life estates cannot be limited at all to unborn persons in succession (c). The latter statement is clearly incorrect (d). The better opinion is that all such limitations are valid provided they are so expressed that they must take effect, if at all, within the legal period. The subject is considered more fully elsewhere in connection with the application of the Rules against Perpetuities to legal remainders. It will be sufficient here to refer to one case which seems to dispose of the question. In *Cadell v. Palmer* (e) there was (1) a trust of real estate for a term of years determinable upon lives in being in favour of successive generations of unborn issue; (2) a trust

(z) 10 L. T. N. S. 292.

(a) *Supra*, p. 46; *Lachlan v. Reynolds*, 9 Ha. 796.

(b) See *Monypenny v. Dering*, 2 D. M. & G. 145, 168; 22 L. J. Ch. 313; *Cole v. Sewell*, 4 Dr. & War. 1, 32; 2 Con. & L. 344; *Catlin v. Brown*, 11 Ha. 372, 375; 1 W. R.

533; *Williams' Real Property*, Appx. F.; *Wollen v. Andrews*, 2 Bing. 126, 130; and see *supra*, p. 166.

(c) *Doe v. Garrod*, 2 B. & Ad. 87, 96.

(d) See *Brudenell v. Elwes*, 1 Fast. 442.

(e) 1 Cl. & F. 372; *supra*, p. 32.

during the continuance of the term to convey the lands, upon request, for life to the person, being a male, for the time being entitled to the rents and profits under the trust of the term. Both these trusts were held by the House of Lords to be valid.

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CHAPTER X.

LIMITATIONS UPON FAILURE OF ISSUE.

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In deeds and in wills previous to the Wills Act a limitation to take effect upon the death of A. without issue is void for remoteness.

THE failure of issue of a person is an event upon which limitations are frequently made to take effect. Previously to the alteration of the law in the case of wills by the Wills Act (1 Vict. c. 26, s. 29) it was a rule of construction that the words "die without issue" and similar expressions, both in deeds and in wills, meant a failure of issue, either at the death of the person whose issue is spoken of, or *at any subsequent period*. Such an event, obviously, is not one which must necessarily occur within the period allowed by the Rule against Perpetuities, and is altogether indefinite in point of time. Consequently a limitation by deed, or by the will of a testator dying before the 1st of January, 1838, expressed to take effect upon the death of a person without issue fails for remoteness (a).

Except where, in the case of realty, an estate tail is limited either expressly or by implication to the person whose issue is spoken of.

If, however, the limitation upon death without issue follows a limitation, either express or implied, to the person whose issue is referred to, of an estate tail in real estate, the limitation over does not fail for remoteness, but takes effect as a remainder expectant upon the determination of the estate tail.

(a) *Boden v. Watson*, Ambl. 398, 478; *Beauclerk v. Dormer*, 2 Atk. 307; *Green v. Rod*, Fitz. 68; *Candy v. Campbell*, 2 Cl. & F. 421; 8 Bli. N. S. 469; *O'Mahoney v. Burdett*, L. R. 7 H. L. 388; 44 L. J. Ch. 56.

A limitation of personal property to A. and the heirs of his body passes the absolute interest; and, with certain exceptions mentioned below (*b*), the rule is the same where the limitation is in terms which, if the subject matter had been realty, would have created an estate tail. A limitation, therefore, of personal property to B. upon failure of issue of A. is void for remoteness; and that whether it follows a limitation to A. and the heirs of his body or not (*c*). Whether it takes effect if A. dies, and his issue fails, in the testator's lifetime, depends upon different considerations. The question is considered elsewhere (*d*).

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Limitation of personal property to B., upon failure of issue of A., following a limitation to A. and the heirs of his body.

In the case of a limitation of real estate in default of issue of A., or in default of issue of A. living at his death, following an express limitation to A. in tail, no question of remoteness can arise. The limitation to B. is either a vested remainder, which will take effect in possession upon the determination of the estate tail at any time, or it is a contingent remainder depending upon the failure of issue of A. at his death (*e*).

Limitation of real estate upon failure of issue of A., following an express limitation to A. in tail, good as a vested or contingent remainder.

The failure of issue of a tenant in tail being the event upon which a remainder after the estate tail takes effect in possession, the effect of a limitation of real estate in default of issue is, in many cases, to raise by implication an estate tail in the person whose issue is spoken of.

Limitation upon death without issue may raise by implication an estate tail in the person whose issue is spoken of.

Thus in the case of a devise of real estate to A. and his heirs, or for life, or generally without words of limitation, followed by a limitation upon A.'s death without issue to B., A. takes an estate tail by implication, and the limitation to B. is good as a remainder (*f*). And a limitation

To A., or to A. for life, or to A. and his heirs, with gift over on A.'s death without issue.

(*b*) See *Forth v. Chapman*, *infra*, p. 186.

(*c*) *Dawson v. Small*, L. R. 18 Eq. 114; *ib.* 9 Ch. 651; 43 L. J. Ch. 406; *In re Johnson's Tr.*, L. R. 2 Eq. 716; 12 J. ar. N. S. 616.

(*d*) See *Mackinnon v. Peach*, *supra*, p. 28.

(*e*) *Ireson v. Pearman*, 3 B. & C. 799; *Broadhurst v. Morris*, 2 B. & Ad. 1; *Coltsmann v. Coltsmann*, L. R. 3 H. L. 121 (see Lord Chelmsford's opinion); *Grey v. Pearson*, 6 H. L. C. 61; 26 L. J. Ch. 473.

(*f*) *Mackell v. Weeding*, 8 Sim. 4; 5 L. J. Ch. 182.

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by deed to the use of A., his heirs and assigns, and if A. die without issue to the use of B., his heirs and assigns, and if both A. and B. die without issue, to the settlor's male issue, has been held to vest estates tail in A. and B. (*g*).

Devise of reversion expectant upon failure of special class of issue.

So also when the subject of a devise is a reversion expectant upon an estate tail, not created by the will, there is no remoteness in a gift expressed to take effect upon a general failure of issue of the tenant in tail. But where the reversion depends, not upon a general failure of issue of the tenant in tail, but upon failure of issue male, or of a particular class of issue, there is sometimes difficulty in determining whether a gift upon failure of issue (not restricted to issue in tail) is an immediate gift of the reversion, or whether it fails for remoteness as taking effect upon an indefinite failure of issue (*h*). The tendency of recent decisions is to treat the words as referring inaccurately to the event upon which the reversion takes effect in possession, rather than as descriptive of the event upon which the gift itself is intended to take effect (*i*).

Limitation by will of real estate to B. upon failure of issue of A., the testator's heir-at-law; A. taking nothing by the terms of the will.

In some cases where the person whose issue is spoken of takes no estate by the terms of the will an estate tail is raised in him by implication. Thus where there was a devise upon the failure of issue of A. to B., A. being heir-at-law to the testator, and taking nothing by the terms of the will, it was held that A. took an estate tail by implication; and that the limitation to B. was good as a remainder after such estate tail (*k*).

To A. and his heirs, and in

Where a limitation of real estate to B. in default of

(*g*) *Morgan v. Morgan*, L. R. 10 Eq. 99; 39 L. J. Ch. 493; but see *Olivant v. Wright*, 9 Ch. D. 646; 47 L. J. Ch. 664.

(*h*) *Lady Lanesborough v. Fox*, Cas. t. Talb. 262; *Jones v. Morgan*, 3 Bro. P. C. 322; *Bankes v. Holme*, 1 Russ. 394.

(*i*) *Eno v. Eno*, 6 Hare, 171; *Egerton v. Jones*, 3 Sim. 409; *Lewis v. Templer*, 33 Beav. 625; 10 L. T. N. S. 638.

(*k*) *Goodright d. Goodridge v. Goodridge*, Willes, 369; 7 Mod. 453; *Daintry v. Daintry*, 6 T. R. 307.

heirs of A. follows an express limitation to A. and his heirs, and B. is a collateral heir of A., A. is held to take an estate tail, and B. a remainder expectant upon it (*l*).

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default of heirs of A., to B., a collateral heir of A.

Where there is interposed between the limitation to the ancestor (the person whose issue is spoken of) and that to take effect upon failure of his issue, a limitation to "issue," either with or without words of limitation super-added, the ancestor takes an estate tail, unless the limitation to issue is such that they take under it as purchasers. Thus under a devise to A. and the issue of his body and the heirs of such issue for ever, or to A. for life, and if A. die leaving issue, to such issue equally (without words of limitation), followed in each case by a gift over upon A.'s death without issue, the gift over is a good remainder after an estate tail in A. (*m*).

To A. and his issue, with or without words of limitation, and if A. die without issue, to B.

If, however, the interposed limitation to issue is such that the issue take under it as purchasers, a subsequent limitation over upon failure of issue is construed to mean such issue as could take under the previous limitation. In this case also the limitation upon failure of issue is not too remote (*n*).

To A., with remainder to his issue as purchasers, and if A. die without issue, over.

An indefinite failure of issue is held to be referred to by the following expressions: "die without having issue" (*o*); "in default of issue" (*p*); "for want of issue" (*q*); "die before he has any issue" (*r*); "die without children," or "without heirs," or "without heirs of the body" (*s*). As to the last three expressions, there was formerly some doubt whether a failure at death was not

Expressions similar to "die without issue" importing an indefinite failure of issue.

(*l*) *Webb v. Hearing*, Cro. Jac. 415; *Tyte v. Willis*, Ca. temp. Talb. 1; *Harris v. Davis*, 1 Coll. 416; 9 Jur. O. S. 269.

(*m*) *Franklin v. Lay*, Mad. & Geld. 258; *Karanagh v. Morland*, Kay, 16; 23 L. J. Ch. 41.

(*n*) See *infra*, p. 199.

(*o*) *Lee's Case*, 1 Leon. case No. 387; *Cole v. Goble*, 13 C. B. 445; 22 L. J. C. P. 148.

(*p*) *Boehm v. Clarke*, 9 Ves. 580.

(*q*) *Wyld v. Lewis*, 1 Atk. 432.

(*r*) *Newton v. Barnardine*, Moo. 127.

(*s*) *Doe d. Smith v. Webber*, 1 B. & Ald. 713; *Raggett v. Beaty*, 5 Bing. 243; *Parker v. Birks*, 1 K. & J. 156; 24 L. J. Ch. 117; *Hughes v. Sayer*, 1 P. W. 534; *Bacon v. Cosby*, 4 De G. & Sm. 261; 20 L. J. Ch. 213.

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Die without
"leaving"
issue. The
rule in *Forth*
v. *Chapman*.

intended, at least in the case of limitations of personalty (*t*), but the contrary seems to be now decided both with regard to real and personal estate.

In the case of a devise of real estate to A. for life, or in fee, followed by a gift over upon A.'s death without issue, it was held, previously to the alteration of the law by the Wills Act (*u*) that the reference to failure of issue showed an intention that the issue should take, and that so long as there were issue of A. in existence the gift over should not take effect (*x*). This supposed intention was carried out by adopting the construction by which, as in the cases above referred to, A. takes an estate tail, upon which the gift over takes effect as a remainder. In the case of a bequest of personal estate, no benefit would accrue to the issue by this construction, since under a limitation which creates an estate tail in real estate, personalty passes absolutely; and a subsequent gift over upon failure of issue of the donee would be altogether void. Hence arose a singular distinction between limitations of real and personal estate expressed to take effect upon the death of A. without *leaving* issue. These words, which, in the case of realty, are held to import an indefinite failure of issue, and so raise by implication an estate tail in the person whose issue is spoken of, in the case of personalty are held to mean failure of issue at the death (*y*). This important rule of construction was established by *Forth v. Chapman* (*z*).

In that case there was a gift by will of real and personal estate, upon the death of A. without leaving issue. It was held that in the case of the real estate the words referred to an indefinite failure of issue, and in the case of the personal estate they meant failure at death. This

(*t*) *Stone v. Maule* 2 Sim. 490;
Mattheys v. Gardiner, 17 Beav. 254;
21 L. T. O. S. 236.

(*u*) See *infra*, p. 203.

(*x*) *Target v. Gaunt*, 1 R. W. 432.

(*y*) See per Lord Hatherley, L. R.
7 H. L. 401.

(*z*) 1 P. W. 663.

case shows that upon the question as to the meaning of such expressions as "die without issue," cases which establish a particular construction where the subject matter of the limitation is realty cannot be depended on as authorities for a like construction where the subject matter is personalty (*a*).

In order to give effect to a gift over depending upon a failure of issue, the Courts have, in the case of personalty, been astute to find indications in the will of an intention to confine the meaning of "die without issue," and similar expressions, to failure at death (*b*). Thus where in one part of a will the testator used in a gift of personal estate the expression "die without leaving issue," and in a subsequent part of the will there was a gift over upon death "without issue," it was held that the latter words were used as a short expression for the former, and imported a failure at death (*c*). So a gift in a will, "in default of issue" was held to refer to a failure at death, because in the codicil the gift was referred to as taking effect upon death without *leaving* issue (*d*). Other instances will be found below of the length to which the Courts will go in so construing "die without issue" *ut res magis valeat quam pereat*.

The Courts are astute to give "die without issue" a restricted meaning in the case of personalty.

The rule in *Forth v. Chapman* is not applicable in the case of a gift of copyholds which do not admit of entail. Thus where copyholds of this character were devised to A., his heirs and assigns, with a gift over on A.'s death

Rule in *Forth v. Chapman* not applicable to copyholds.

(*a*) See per Cairns, C., as to the different effect of a devise in the same words, where the subject matter is different, *Coltsmann v. Coltsmann*, L. R. 3 H. L. 121, 130; and *Murthwaite v. Jenkinson*, Sugd. R. P. 258.

(*b*) See *Sheffield v. Ld. Orrery*, 3 Atk. 282, 288; *Crooke v. De Vandes*, 9 Ves. 197, 204; *Atkinson v. Hutchinson*, 3 P. W. 258; *Lampley v. Blower*, 3 Atk. 396; *Goodtitle d.*

Peake v. Pegden, 2 T. R. 720; *Coltsmann v. Coltsmann*, L. R. 3 H. L. 121.

(*c*) *Sheppard v. Lessingham*, Amb. 122; *Rudford v. Rudford*, 1 Keen, 486; 6 L. J. Ch. 138; *Greenway v. Greenway*, 2 De G. F. & J. 128; 29 L. J. Ch. 631; *Falkiner v. Hornidge*, 8 Ir. Ch. Rep. 184.

(*d*) *Darley v. Martin*, 13 C. B. 683; 22 L. J. C. P. 249.

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Or to a deed. And the rule in *Forth v. Chapman* would probably be held not to apply to a deed (*f*).

Restricted meaning of "die without issue" where failure of issue is associated with event personal to the ancestor whose issue is spoken of.

The restricted meaning of "die without issue" will be adopted where the phrase is associated with an event "personal" to him whose issue is spoken of—an event the occurrence or non-occurrence of which is determined by his death. Thus, under a limitation to A., or to A. and his heirs, and if A. die under twenty-one without issue, or if A. die under twenty-one *and* without issue, or if A. die under twenty-one and unmarried, to B., the limitation to B. takes effect as upon a failure of issue living at the death of A. (*g*). And the same construction holds where the gift over is in case the prior taker dies under twenty-one, *or* there is failure of his issue; in which case *or* is read *and* (*h*). The reason for adopting the restricted construction in this latter case is stated by Lord Ellenborough:—"It is in order to avoid the mischief, which would otherwise happen, of carrying over the estate if the first devisee died under twenty-one though he had left issue . . . the testator leaving it to the devisee after his attaining twenty-one to make what provision he pleased for his issue, if he had any; but only providing in the event of the devisee dying

(*e*) *Doe d. Blesard v. Simpson*, 4 Bing. N. C. 333; 3 Man. & G. 929.

(*f*) *Olivant v. Wright*, 9 Ch. D. 646, 650; 47 L. J. Ch. 664.

(*g*) *Toovey v. Basset*, 10 East, 460; *Martin v. Long*, 2 Vern. 151; *Glover v. Monckton*, 3 Bing. 13; *Doe d. Johnson v. Johnson*, 8 Ex. 81; 22 L. J. Ex. 90; *Gwynne v. Berry*, Ir.

Rep. 9 C. L. 494. The above cases seem to establish the proposition in the text; but they are, perhaps, not *decisive*.

(*h*) *Price v. Hunt*, Pollex, 645; *Fairfield v. Morgan*, 2 Bos. & Pul. N. R. 38; *Right v. Day*, 16 East, 67; *Doe d. Wilkins v. Kemys*, 9 East, 366.

under twenty-one that the estate should not go over from his issue (*i*)."

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Where there was a limitation of real estate to A. and the heirs of his body, with a limitation over to B. on A.'s death under twenty-one and without issue, the failure of issue was held to be a failure at the death of A.; and B. took a remainder after A.'s estate tail contingent upon A.'s dying under twenty-one without issue then living (*k*).

In the case of a limitation of real estate in fee, or of personalty absolutely, to A., followed by a gift over to B., if A. die without issue and without having disposed of the property, the gift over to B. is void as being repugnant to the previous limitation of the fee or absolute interest to A. The construction is the same where the gift over is, if A. die without issue or without having disposed of the property; or being read *and* (*l*).

In the case of a devise of real estate to A. for life or in fee, followed by a limitation over to B., in default of issue of A. *at* or *on* the death of A., the limitation over takes effect on A.'s death without issue then living (*m*). Where in a will not affected by the Wills Act there was a devise of real estate without words of limitation to John, followed by a proviso that if John should die without heirs of his body the lands should, *at John's decease*, go to Daniel, in fee, it was held that John took for life, and

(*i*) 16 East, 69.

(*k*) *Grey v. Pearson*, 6 H. L. Cas. 61; 26 L. J. Ch. 473.

(*l*) *Grey v. Montagu*, 3 B. P. C. 314; 2 Eden, 205; *Greated v. Greated*, 26 Beav. 621; 28 L. J. Ch. 756; (this case was doubted by James, L. J., 6 Ch. D. 15); *Beachcroft v. Broome*, 4 T. R. 441; *Green v. Harvey*, 1 Hare, 428; 6 Jur. O. S. 704; *Incorporated Society v. Richards*, 1 Dr. & W. 258. As to repugnancy, see *Holmes v. Godson*, 8

D. M. & G. 152; 25 L. J. Ch. 317; *Re Wilcocks' Settlement*, 1 Ch. D. 229; 45 L. J. Ch. 163; *In re Stringer's Estate*, 6 Ch. D. 1; 46 L. J. Ch. 823.

(*m*) *Ex parte Davies*, 2 Sim. N. S. 114; 21 L. J. Ch. 135; *Coltsmann v. Coltsmann*, L. R. 3 H. L. 121; *Doe d. King v. Frost*, 3 B. & Ald. 546; *Parker v. Birks*, 1 K. & J. 156; 24 L. J. Ch. 117; *Grey v. Pearson*, 6 H. L. C. 61; 26 L. J. Ch. 473.

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Daniel a remainder [in fee contingent upon failure at John's death of heirs of his body (*n*).

Bequest of personalty to A., with gift over upon failure of A.'s issue, *at*, *on*, or *after* his death.

A bequest of personal property to A., with a gift over upon failure of A.'s issue *at*, *on*, or *after* his death, is construed to mean a failure of issue at the death of A. (*o*). But under a bequest to A. and his male issue, "and for want of male issue after him" to B., it was held that A took an absolute interest in personalty, the gift over being void for remoteness (*p*).

The word "after" in the same context does not appear to have the effect of restricting the meaning of failure of issue where the limitation is of real estate (*q*). Thus in the case of a devise to A. and his heirs, with a gift over upon failure of his issue *after his death* to B., it was held by Sir E. Sugden that A. took an estate tail (*r*).

A condition to be performed within a stated period annexed to gift upon failure of issue restricts the meaning of "die without issue."

Sometimes a condition is annexed to a gift upon failure of issue which raises an inference that a failure at death, and not an indefinite failure, was intended. Payment by the donee of a sum of money within a stated period is such a condition (*s*). Where a charge was raised for the benefit of the executors or the appointees by will of the person whose issue was spoken of, it was held that failure at death was intended (*t*).

Direction to pay to a living person a sum to be raised on death without issue.

It has been said that if there is a direction to pay a sum so charged to a person living at the date of the will, or at the death of the prior taker, and not to him, his executors and administrators, there is an indication that the legatee is intended personally to enjoy the sum so charged, and

(*n*) *Coltsmann v. Coltsmann*, L. R. 3 H. L. 121.

(*o*) *Rackstraw v. Vile*, 1 S. & S. 604; *Stratford v. Powell*, 1 Bal. & B. 1; *Pinbury v. Elkin*, 1 P. W. 563; *Wilkinson v. South*, 7 T. R. 555; *In re Sanders' Trusts*, L. R. 1 Eq. 675; 12 Jur. N. S. 351.

(*p*) *Donn v. Perry*, 19 Ves. 544.

(*q*) *Walter v. Drew*, Com. 372; *Doe d. Cock v. Cooper*, 1 East, 229.

(*r*) *Jones v. Ryan*, Ir. Rep. 9 Eq.

249.

(*s*) *In re Rye's Settlement*, 10 Hare, 106; 22 L. J. Ch. 345; *Blinston v. Warburton*, 2 K. & J. 400; 25 L. J. Ch. 468; *Wylde v. Lewis*, 1 Atk. 432, would not be followed at the present day. See *per Wood, V.-C.*, *Parker v. Birks*, 1 A. & J. 156, 161; 24 L. J. Ch. 117.

(*t*) *Doe d. Smith v. Webber*, 1 B. & Ald. 713.

that therefore a failure of issue at death is intended (u). But it is doubtful whether such a construction would hold at the present day. In *Dunk v. Fenner* (x) no such intention was inferred from the fact of an annuity for the life of a living person being charged on real estate given over on a failure of issue. And in *Doe d. Todd v. Duesbury* (y) Rolfe, B., expressly denied the validity of the argument drawn from the supposed intention of personal enjoyment. He said: "The foundation on which this argument rests wholly fails, inasmuch as there is nothing to justify the inference that the gift was intended to be personal to (the donee), and dependent on her being alive to receive it, when payable. A legacy to A. is the same thing as a legacy to him, his executors and administrators, and will be payable to them, whether they are named or not, unless there is something in the will to point to a different construction." But in *Rye's Settlement Trusts* (z), where there was a direction that a sum so charged should vest in the legatee at his age of twenty-one years or marriage, and be paid to him at the death of the person the failure of whose issue was spoken of, it was held that a failure at death was intended. If it can be gathered from the will that the legatee of the charge, being a person in existence at the date of the will, was intended personally to enjoy the gift, as where the charge is raised in favour of the testator's daughter, "for her own use and benefit," the gift over on failure of issue is good, and is held to take effect upon a failure at death (a).

There are dicta to the effect that where a gift over upon a failure of issue is to a person who is in existence at the date of the will, the failure of issue is confined to

Limitation to B., a person in existence at the date of the limitation,

(u) *Massey v. Hudson*, 2 Mer. 130.

(x) 2 Russ. & M. 557.

(y) 8 M. & W. 530; 10 L. J. Ex. 410.

(z) 10 Hare, 106; 22 L. J. Ch.

345.

(a) *Coltsmann v. Coltsmann*, L. R. 3 H. L. 121. See also *Greenwood v. Verdon*, 1 K. & J. 74; 24 L. J. Ch. 601.

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upon A.'s
death without
issue.

a failure at death (*b*). It is submitted that this construction is opposed to many decided cases and that it cannot be upheld (*c*). The decision in *Jones v. Cullimore* (*d*), which seems to be in its favour, can be supported upon other grounds.

Gift by will in
default of
testator's own
issue.

It has been considered that an exception to the general rule as to the indefinite meaning of "die without issue" occurs in the case of a gift by will in default of the testator's own issue. There is some authority that in such a case the failure intended is a failure of issue at the testator's death (*e*). But the cases are not clear, and are by no means decisive of the point. *In re Rye's Settlement* (*f*) the decision went upon other grounds, and the Vice-Chancellor in his judgment made no reference to the doctrine above stated; which, if true, would have rendered further discussion of the testator's intention in that case unnecessary.

Limitation
upon the death
of A. without
issue upon
trust to pay
debts.

Where the limitation to take effect upon a failure of issue is upon trust to pay debts, it has been held that failure at death is intended (*g*). Such a trust could not reasonably be meant to depend upon an indefinite failure of issue, and this is an indication that the restricted meaning was intended (*h*). The authorities are clear that when you have the two circumstances of (1) the testator being at the time of his death childless; and (2) of his devising the property for the purpose of paying his debts, which purpose is to be carried into effect immediately

(*b*) Cf. *Webster v. Parr*, 26 Beav. 236, 238.

(*c*) *Greenwood v. Verdon*, 1 K. & J. 74; 24 L. J. Ch. 65; *Grey v. Montagu*, 3 B. P. C. 314; 2 Ed. 205; *Massey v. Hudson*, *ubi supra*.

(*d*) 3 Jur. N. S. 404.

(*e*) *Wellington v. Wellington*, 4 Burr. 2165; *French v. Caddell*, 3 Bro. P. C. 257; *Sandford v. Irby*, 3 B. & Ald. 654; *Lytton v. Lytton*, 4 Bro. C. C. 441; *Eno v. Eno*, 6 Hare, 171. *Sandford v. Irby* is

spoken of by Shadwell, V.-C., as "a strong decision" in *Egerton v. Jones*, 3 Sim. 409, 417.

(*f*) 10 Hare, 106; 22 L. J. Ch. 345.

(*g*) *French v. Caddell*, 3 Bro. P. C. 257; *Wellington v. Wellington*, 4 Burr. 2165; *Lytton v. Lytton*, 4 Bro. P. C. 441.

(*h*) See per Turner, V.-C., *Rye's Settlement Tr.*, 10 Hare, 106, 111; 22 L. J. Ch. 345.

upon his death, then the sense to be attributed to the words "in default of issue of my body" is "in default of issue living at my death" (*i*). Chap. X.

Where the subject matter of a limitation is an estate or interest which necessarily comes to an end within the period allowed by the perpetuity rule, it would seem that no question of remoteness can be raised. It is impossible, for example, that any limitation of an estate *pur autre vie*, even though expressed to take effect upon an event which may not happen within the perpetuity limit, can, in fact, take effect beyond the legal period (*k*). So in *Harris v. Davis* (*l*), where the question was one of remoteness in a gift of leaseholds, Shadwell, V.-C., in delivering judgment against the validity of the gift, expressly stated that he assumed that the leaseholds had more than twenty-one years to run and were not for lives.

A limitation of a life interest to a person living at the date of the limitation must take effect, if at all, within the life of the donee. It would seem, therefore, that no question of remoteness could arise upon such a limitation (*m*). It does not appear, however, to have been expressly decided that a limitation of a life estate to B., a living person, upon an indefinite failure of issue of A., is valid. In *Simmons v. Simmons* (*n*), where there was a limitation of real and personal estate to A. for life, with power for A. to dispose of it by will amongst her own issue; but if A. die without issue, to B. for life, with a gift over if B. die before A., it was held that A. took an

Limitation upon A.'s death without issue of an estate *pur autre vie*.

Limitation, upon failure of issue of A., to B., a person in existence at the date of the limitation, for life.

(*i*) Per Kindersley, V.-C., *Bagot v. Legge*, 10 Jur. N. S. 994; 34 L. J. Ch. 156.

(*k*) See per Brougham, C., *Campbell v. Harding*, 2 Russ. & My. 390, 406.

(*l*) 1 Coll. 416; 9 Jur. O. S. 269. And see 45 & 46 Vict. c. 39, s. 10, *infra*, p. , which seems to assume the validity of a limitation upon an indefinite failure of issue in certain cases.

(*m*) The question was raised but not decided in *King v. Cotton*, 2 P. W. 674; in *Oakes v. Chalfout*, Pollex. 38, the limitation for life following life estates to unborn persons was held good.

(*n*) 8 Sim. 22; 5 L. J. Ch. 198; the validity of the gift to Gwin Simmons, (B), upon the ground above suggested does not appear to have been considered.

Chap. X. estate tail in the real estate, and the personalty absolutely.

Cases in which the validity of a limitation to B., a living person, for life, upon failure of issue of A. has been discussed, have been decided in favour of the limitation; but upon the ground that the failure of issue intended was a failure within the lives of A. (o) or of B. (p). And the limitation over to B. being for life only has been relied upon as indicating that a restricted failure was intended, and not as a ground for the validity of the limitation independently of the event upon which it was expressed to take effect (q).

Where the limitation over carries, besides the life interest to B., the fee or absolute interest, it has been held that there is no ground for construing failure of issue in the restricted sense (r). Thus in the case of a limitation upon failure of issue of A., to B. for life, with remainder to C. in fee, the limitations to B. and C. would, it seems, be void for remoteness (r).

Limitation upon failure of issue of A. to a person or class of persons in existence at the date of the limitation, if they be alive to take.

Where there is a limitation upon failure of issue of A. to a person or class of persons in existence at the date of the instrument or at the testator's death, and it can be collected from the instrument that the limitation was intended to take effect only in the event of the person intended to take being alive at the time of the limitation taking effect in possession, the failure of issue is not indefinite, and the limitation is not too remote. "There has been a series of authorities from *Hughes v. Sayer* (s)

(o) *Roe d. Sheers v. Jeffery*, 7 T. R. 589; *Doe d. Lyde v. Lyde*, 1 T. R. 593; See per Bayley, J., *Doe d. Jones v. Owens*, 1 B. & Ad. 318, 321.

(p) See *Barlow v. Salter*, 17 Ves. 479, 483; *Campbell v. Harding*, 2 Russ. & My. 390 407; *Trafford v. Boehm*, 3 Atk. 440, 449.

(q) *Simmons v. Simmons*, 8 Sim. 22.

(r) *In re Rye's Settlement*, 10 Ha.

106; 22 L. J. Ch. 345; *Fisher v. Webster*, L. R. 14 Eq. 283; 42 L. J. Ch. 156; *Barlow v. Salter*, 17 Ves. 479; *Simmons v. Simmons*, 8 Sim. 22. But see *contra dicta* of Buller, J., in *Doe d. Lyde v. Lyde*, 1 T. R. 597; and cf. *Brougham, C., in Campbell v. Harding*, 2 R. & M. 390, 407.

(s) 1 P. W. 534.

which have established the rule that when it is apparent on the face of the will that the testator intended to give a personal benefit to those to whom the estate is limited in default of issue, and not a transmissible interest, in such cases the construction that an indefinite failure of issue was intended is out of the question, because it could not be supposed that the testator could have intended to confer a personal benefit, and yet to postpone it till after an indefinite failure of issue" (t).

Where there is a limitation of real or personal estate to A. and B., or to a class of living persons, and upon the death of either or any of them, without issue, to the survivor or survivors for life, or without words of limitation, it is held that the survivor is intended to take a personal benefit, and the limitation is good; death without issue being construed in a restricted sense (u).

In these cases the argument derived from the use of the word "survivor" is, that it is not natural to suppose that the testator intended a limitation over for the benefit of the survivor after an indefinite failure of issue, by way of transmissible interest, because the gift over is to depend on the mere accident of survivorship (x). If the gift over is to the survivor, his executors administrators and assigns, this argument has no application (y); nor does it apply where the gift is to living persons and the issue of such of them as are dead (z). In such cases the gift over is void for remoteness.

The restricted construction is adopted where the limitation upon failure of issue of A. is to the survivors of

(t) Per Wood, V.C., *Greenwood v. Verdon*, 1 K. & J. 74, 81; 24 L. J. Ch. 65.

(u) *Hughes v. Sayer*, 1 P. W. 534; *Massey v. Hudson*, 2 Mer. 130; *Ranelagh v. Ranelagh*, 2 M. & K. 441; 1 L. J. Ch. 183; *Turner v. Frampton*, 2 Coll. 331; 10 Jur. O. S. 24; *Westwood v. Southey*, 2 Sim. N. S. 192; *Chaddock v. Cowley*, Cro.

Jac. 695, and *Roe v. Scott*, F. C. R. 473 would probably not be followed now. See *Greenwood v. Verdon*, *ubi supra*.

(x) Per Wood, V.-C., *Greenwood v. Verdon*, *ubi supra*.

(y) *Massey v. Hudson*, 2 Mer. 130.

(z) *Webster v. Parr*, 2 Q. B. 236.

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any class of living persons, whether named before in the will or not (*a*); but not where the gift over is to the class or such of them as shall be then living; in which case all the members of the class take transmissible interests, if none survive (*b*); nor where the limitation over is to such of a class of living persons as survive some period other than the failure of issue (*c*).

Limitation
upon failure
within the
perpetuity
limit of issue
of A.

It is evident from the cases above cited that the validity, with regard to the perpetuity rule, of limitations expressed to take effect upon a failure of issue of A., does not depend necessarily upon the question whether the failure intended is a failure at the death of A., the person whose issue is spoken of or not. If the failure of issue is expressly or by necessary implication restrained to a period allowed by the perpetuity rule, the limitation will not be too remote, although it may take effect upon a failure of issue after A.'s death. Thus no question of remoteness can arise upon a limitation in default of issue of A. within the life of B., a living person, or within twenty-one years after his death. Such a limitation must necessarily take effect within the period allowed by the perpetuity rule, and would carry over the estate, although A. left issue living at his death, upon a subsequent failure of such issue during B.'s life, or within twenty-one years after his death (*d*). In the case of a gift by will of real and personal property to A., but if A. should die in the life of B. without leaving issue, over, it was held that the gift over takes effect in case of A.'s death, and subsequent failure of issue in the life of B. (*e*). So a limitation upon failure of issue of A. who survive A., or of issue living at the testator's death, is not void for remoteness; and will take

(a) *Greenwood v. Verdon*, *ubi supra*; *Wilson v. Chesnut*, 1 Ir. Rep. Eq. 559.

(b) *Browne v. Lord Kenyon*, 3 Mad. 410; *Hawkins on Wills*, 266.

(c) *Garrett v. Cockerell*, 1 Y. & C. C. C. 494; 6 Jur. O. S. 909.

(d) *Greenwood v. Verdon*, 1 K. & J. 74; 24 L. J. Ch. 65; *Jarman v. Vye*, L. R. 2 Eq. 784; 35 L. J. Ch. 821; and see *Murray v. Addenbrook*, 4 Russ. 407, 421.

(e) *Jarman v. Vye*, *supra*.

effect upon a failure of the class of issue spoken of Chap. X.
happening after A.'s death (*f*).

In *Greenwood v. Verdon* (*g*) the devise was, by the will of a testator who died in the year 1809, to A. in fee, and after his death without issue to the survivors of certain legatees (living persons) named in the will. It was held by Wood, V.-C., after a careful review of all the cases, that the limitation upon failure of issue was not too remote. The ground of the decision was that the gift to *survivors* implied a personal enjoyment by some of the legatees, and that therefore the failure of issue intended was a failure in the lifetime of the legatees or some of them.

In *Mackinnon v. Peach* (*h*) there was a bequest to the testator's two daughters, with a direction that upon the death of either of them without issue "the share of her so dying shall go to her sister." One of the sisters having died in the testator's life, it was held by Langdale, M.R., that her share passed to her sister. From the judgment it appears that the decision would have been the same had the daughter survived the testator and afterwards died without issue. It is submitted that in such a case the gift must have failed for remoteness, unless either the death could be construed to mean death in the testator's life, or there could be discovered in the will some indication that the surviving daughter was intended personally to take (*i*).

It would seem that the construction of "die without issue" adopted in *Greenwood v. Verdon* would now be followed in cases similar to *Pells v. Brown* (*k*), *Hughes v. Sayer* (*l*), and *Westwood v. Southey* (*m*). Failure of issue

(*f*) See *Gee v. Liddell*, L. R. 2 Eq. 341; 35 L. J. Ch. 640; where *issue who survive A.* was held to exclude issue born after A.'s death. But see *In re Clarke's Estate*, 3 D. J. & S. 111.

(*g*) *Ubi supra*.

(*h*) 2 Keen, 555.

(*i*) As to whether a gift upon failure of issue of A. will take effect, if A. dies in the testator's life, see *infra*, p. 203.

(*k*) *Infra*, p. 198.

(*l*) *Supra*, p. 194.

(*m*) 2 Sim. N. S. 192.

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in those cases was held to mean failure at the death of the prior taker, the person whose issue was spoken of; but the question did not arise, and was not discussed, whether the failure intended was not a failure within the life of the survivor of the prior taker and the donee under the gift upon failure of issue. The reasoning of the Vice-Chancellor in *Greenwood v. Verdon* seems to apply to all such cases as those above mentioned. In *Pells v. Brown* it was said, but not decided, that in the case of a limitation to A., his heirs and assigns, and upon A.'s death without issue, living B., to B., B. would not take, if A. left issue living at his death. From *Greenwood v. Verdon* it would seem that B. would take in case of failure of issue occurring after A.'s death and in the lifetime of B.

It has been said (n) that the decision in *Pells v. Brown* should have been, that A. took an estate tail, with remainder to B., contingent upon failure of issue of A. in B.'s lifetime. It is submitted that the decision in question is correct (o). It is difficult to see upon what ground the express limitation of the fee to A. could be cut down to an estate tail. The intention of the testator is accurately carried out by giving the words their ordinary and proper legal effect; while to hold that A. takes an estate tail, with remainder to B. contingent upon failure of issue at A.'s death, involves an intestacy in the event of A. leaving issue surviving him and subsequently failing in B.'s lifetime. Moreover, since, under a limitation to A. in fee, or for life, or indefinitely, and upon A.'s death without issue living at his death, to B., A. takes the fee, or a life estate, with an executory gift over, or remainder to B. (p), it seems inconsistent to hold that where there is a limitation over upon A.'s death without issue living at the death of

(n) Lewis on Perp., 226; 1 Jarman's Powell on Devises, 188.

(o) See *Doe d. Johnson v. Johnson*, L. J. Ex. 90; 8 Ex. 95; *Crowder v. Stone*, 3 Russ. 217; *Jarman v. Vye*,

L. R. 2 Eq. 784; 35 L. J. Ch. 821.

(p) *Greene v. Ward*, 1 Russ. 262; *Doe d. Barnfield v. Wetton*, 2 Bos. & Pull. 324; *Bacon v. Hill*, Moore, 464.

B., A. takes an estate tail. To raise an estate tail in A., the implied gift to issue must be to all the issue, not to a limited class of issue.

"Issue" is often used in the sense of "children." In such cases where the person whose issue is spoken of is living at the date of the limitation, or at the death of the testator, no question of remoteness arises upon a limitation to take effect upon "death without issue." Thus in the case of a limitation of real or personal estate to A. for life, with remainder to A.'s children as purchasers, followed by a limitation over upon A.'s death without issue, the term *issue* is confined to issue who would take under the previous limitation, and the ultimate limitation is good as a contingent remainder or executory limitation taking effect upon A.'s death without children then living (*q*).

"Referential" construction. Issue held to mean children or such issue as before mentioned.

Where the limitation to children is such that there may be children who do not take under it, as in the case of a gift to children attaining twenty-one, the reasons for holding *issue* to mean *children* (*r*) are not so strong as in cases where all children take vested interests at birth. But in *Re Mercer's Trusts*, *ubi supra*, Malins, V.-C., held that the referential construction holds in this case also.

So "issue" may be construed to mean "children" where the limitation upon death without issue precedes a limitation to children of the person whose issue is spoken of; as in *Eastwood v. Avison* (*s*), where the devise was to A., and if he die without issue, over; but if he have children, he shall have power to dispose of the land by will amongst his children. It was held that die without *issue* meant

(*q*) *Goodright v. Dunham*, 1 Doug. 264; *Malcolm v. Taylor*, 2 Russ. & M. 416; *Walker v. Petchell*, 1 C. B. 652; *In re Wyndham's Tr.* L. R. 1 Eq. 290; *Re Mercer's Tr.*, 4 Ch. D. 182; 47 L. J. Ch. 114; *Re Hopkins' Tr.*, 9 Ch. D. 131; 47 L. J. Ch. 672.

(*r*) See *Pride v. Fooks*, 2 De G. & J. 252, 280; 28 L. J. Ch. 81.

(*s*) L. R. 4 Ex. 141; 38 L. J. Ex. 74. It does not appear from the report in L. R. that Samuel left no children. If he left any, they would have taken to the exclusion of the plaintiff.

Chap. X. die without children. *Leeming v. Sherratt* (t) is an instance of the same construction of "die without issue" in a bequest of personalty.

To A. for life,
remainder to
A.'s issue as A.
shall appoint,
with gift over
on A.'s death
without issue.

And by a similar construction, where there is a limitation of real or personal property to A. for life, with remainder to his issue as A. shall appoint, followed by a gift over upon A.'s death without issue, the gift over is held good, as taking effect upon a failure of such issue as could take, either under the power, or under the implied gift in default of appointment (u).

It is not clear whether the limitation over in such cases as *Target v. Gaunt* would take effect upon a failure, within the perpetuity limit, of issue born after A.'s death. *Hockley v. Mawbey* has been cited as an authority that issue born after A.'s death and within the perpetuity limit are valid objects of the power (x); but it was clearly the opinion of the Court, both in *Target v. Gaunt* and in *Hockley v. Mawbey*, that the power was confined to issue born in A.'s life and living at his death. In this view the gift over would take effect only upon failure of issue at A.'s death (y). Perhaps in these cases, the issue whose failure is spoken of are to be ascertained, not by reference to those who are objects of the power, but by reference to those who take by implication in default of execution of the power. The two classes are not co-extensive; but the latter is certainly confined to issue born in A.'s lifetime (z).

No general rule can be laid down as to when a limitation expressed to take effect upon a failure of issue is to be construed as taking effect upon failure of a limited class

(t) 2 Hare, 14; 11 L. J. Ch. 423.

(u) *Target v. Gaunt* 1 P. W. 432; *Hockley v. Mawbey*, 1 Ves. 142; and see *Bradley v. Cartwright*, L. R. 2 C. P. 511; 36 L. J. C. P. 218; *Eastwood v. Avison*, L. R. 4 Ex. 141; 38 L. J. Ex. 74.

(x) Sugden on Powers, 8th ed., p. 397.

(y) This view is adopted in Lewis on Perpetuities, pp. 346, *seq.* and in 2 Jarman on Wills, 4th ed. 530, 531; and seems to be supported by *Re White's Trust*, Johns. 656.

(z) *Penny v. Turner*, 2 Ph. 493; 17 L. J. Ch. 133; *Re White's Tr.*, Johns. 656; *Paul v. Compton*, 8 Ves. 375; *Burrough v. Philcox*, 5 My. & Cr. 72.

of issue previously mentioned. In each case the meaning of the expression will be determined by the language of the particular instrument (a). Chap. X.

The context sometimes shows that a gift upon death without issue is intended to take effect upon a failure of issue at death, or within the perpetuity limit. Thus in *Ex parte Davies* (b) a clause, explaining that the gift over on failure of issue of A., a prior taker, did not include certain children because A. would have it in his power to provide for them, was held to point to a failure of issue at death. So the issue to fail may be a limited class of issue, all of whom must die within the perpetuity limit. Thus a gift over upon failure of issue of A., if none of such issue survive A. and the testator, was held to be valid because the issue spoken of were issue living at the testator's death. Issue born afterwards could not, it was held, be said to survive the testator (c).

Sometimes the position of the limitation upon "death without issue" with regard to another limitation in the same instrument expressed to take effect upon either the existence, or the failure, of issue living at the death shows that the event upon which the former limitation is to take effect corresponds with, or is alternative to, that upon which the latter limitation depends. In such cases the expression has the restricted meaning. Thus no question of remoteness can arise upon a limitation upon *death without issue*, where it is preceded by an alternative limitation upon *death with issue*. It is submitted that by the antithetical use of the two expressions the indefinite meaning of *death without issue* is excluded, and it must be held to mean failure of issue at death.

Thus where personal estate was bequeathed, as to one Bequest in

(a) See *Pride v. Fooks*, 3 De G. & J. 252; 28 L. J. Ch. 81; *In re Merceron's Tr.* 4 Ch. D. 182; 47 L. J. Ch. 114.

(b) 2 Sim. N. S. 114; 21 L. J.

Ch. 135.

(c) *Gee v. Liddell*, L. R. 2 Eq. 341; 35 L. J. Ch. 640. But see *In re Clarke's Estate*, 3 D. J. & S. 111.

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moieties, as to one upon death without issue then living; as to the other upon death without issue.

moiety, to A. for life, and upon A.'s death *without issue then living*, to B.; and as to the other moiety to B. for life and upon B.'s death *without issue*, to A., it was held that the latter was a short expression intended to have the same meaning as the former, and the gift over after B.'s life interest was held good (*d*). In *Carter v. Bentall* (*e*), however, where there were bequests of moieties, in each case, upon death without issue, the bequests were held good, as to one moiety, and, as to the other, void for remoteness.

Limitation of real or personal estate to A. in fee, or absolutely, with limitations over in both events of A. dying with, and without, issue.

If there is a limitation of real or personal estate in terms which show that the absolute interest is intended to pass, and there follow limitations both in the event of the prior taker dying with issue then living, and in the event of his dying without such issue, or without issue generally, the limitations over are held to take effect only in the event of the death of the person whose issue is spoken of in the lifetime of the testator (*f*). This construction is adopted only in cases where the gifts over are repugnant to the prior limitation. It does not apply where the prior limitation is for life, or indefinite in terms, or where without incongruity it may be construed to be for life (*g*).

Where the gift to the person whose issue is spoken of is preceded by a life interest, as where there is a gift to A. for life, remainder to B. (absolutely), with gifts over on B.'s death with, and on his death without, issue, the death spoken of is held to be death before the remainder to B. takes effect in possession (*h*).

(*d*) *Sheppard v. Lessingham*, Ambl. 122; *Kirkpatrick v. Kirkpatrick*, 13 Ves. 476; *Greenway v. Greenway*, 2 De G. F. & J. 128; 29 L. J. Ch. 601.

(*e*) 2 Beav. 551; 9 L. J. Ch. 303; neither of the above cases were cited.

(*f*) *Clayton v. Lowe*, 5 B. & Ald. 636; *Gee v. Mayor, &c. of Manchester*, 17 Q. B. 737; 21 L. J. Q. B. 242.

(*g*) *Kavanagh v. Morland*, Kay, 16; 23 L. J. Ch. 41; *Gosling v. Townsend*, 17 Beav. 245, on app. 2 W. R. 23; *Cooper v. Cooper*, 1 K. & J. 658; 3 W. R. 470; *Bowers v. Bowers*, L. R. 8 Eq. 283; *ib.* 5 Ch. 244; 38 L. J. Ch. 596; 39 L. J. Ch. 351.

(*h*) *Da Costa v. Keir*, 3 Russ. 360; *Gallard v. Leonard*, 1 Swanst. 161.

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Where there is a limitation to A. for life, with remainder to B., followed by a gift over on B.'s death without issue, in the absence of evidence upon the instrument itself to the contrary, death without issue is held to mean failure of issue at any time (*i*); and is not restricted to mean death and failure of issue in the lifetime of the tenant for life (*k*).

To A. for life, remainder to B., with limitation over on B.'s death without issue.

It does not appear to have been decided whether a gift by will to B., upon A.'s death without issue, would take effect if A. were to die in the testator's lifetime without issue; or whether it would fail for remoteness. In *Mackinnon v. Peach* (*l*) such a bequest was held to be good, but it is not clear that in this case the gift over would not have taken effect if A.'s issue had failed after the testator's death. In *Harris v. Davis* (*m*) Vice-Chancellor Knight Bruce said that a bequest of a specific chattel to A. and the heirs of his body, and in default of such issue to B., would lapse, if A. died in the testator's lifetime; and that if *Mackinnon v. Peach* decided the contrary he dissented from it.

Whether a gift by will upon A.'s death without issue generally takes effect upon A.'s death and failure of his issue in the testator's lifetime.

By s. 29 of the Wills Act it is enacted:

"That in any devise or bequest of real or personal estate the words 'die without issue,' or 'die without leaving issue,' or 'have no issue,' or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue (*n*), shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by

Meaning of "die without issue" since the Wills Act (1 Vict. c. 26, s. 29).

(*i*) *O'Mahoney v. Burdett*, L. R. 7 H. L. 388; 44 L. J. Ch. 56; *Ingram v. Soutten*, *ib.* 408; 44 L. J. Ch. 55.

(*k*) The opinion of Romilly, M.R., to this effect in *Edwards v. Edwards*, 15 Beav. 357; 21 L. J. Ch. 324; is expressly dissented from in the above cases.

(*l*) 2 Keen, 555; *supra*, p. 28.

(*m*) 1 Coll. 416, 424; 9 Jur. O. S. 269; see also *Randfield v. Randfield*, 8 H. L. C. 225, as to a will speaking from the death; *Andrew v. Andrew*, 1 Coll. 686, 690.

(*n*) Such as "in default of his having a son," *Andrew v. Andrew*, 1 Ch. D. 410, 417; 45 L. J. Ch. 232.

Chap. X. the will, by reason of such person having a prior estate tail, or of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise: Provided that this Act shall not extend to cases where such words as aforesaid import, if no issue described in a preceding gift shall be born, or, if there shall be no issue who shall live to attain the age, or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue."

This enactment, which applies to wills of persons dying since the 31st of December, 1838, has removed much of the difficulty caused by the old rule of construction as to the indefinite meaning of "die without issue." It is to be observed, however, that the Act has no application where the failure of issue is such that, before the Act, it would not have been held to mean an indefinite failure (*o*); nor where it is a failure of "heirs," or "heirs of the body" (*p*); nor where by the referential construction it refers to issue before mentioned (*q*). It is doubtful whether the words "unless a contrary intention shall appear by the will by reason of such person having a prior estate tail, &c.," apply to a bequest of personalty to A. and the heirs of his body (*r*).

In an Irish case (*s*), by a will subject to the Act, lands were devised to A. in fee upon his attaining twenty-one, with a prohibition against alienation before his attaining thirty; and a gift over in case he should alienate before attaining thirty, or in case he should not "leave any child or children or issue of the same" who should attain twenty-one. It was held that s. 29 of the Wills Act

(*o*) *Morris v. Morris*, 17 Beav. 198; 17 Jur. O. S. 966; *Greenway v. Greenway*, 2 De G. F. & J. 128; 29 L. J. Ch. 601.

(*p*) *Harris v. Davis*, 1 Coll. 416; 9 Jur. O. S. 269; *Dawson v. Small*, L. R. 9 Ch. 651.

(*q*) *Green v. Green*, 3 De G. &

Sm. 480; 18 L. J. Ch. 465; *Greenway v. Greenway*, *ubi supra*.

(*r*) See *Greenway v. Greenway*, 2 D. F. & J. 128, 137; 29 L. J. Ch. 601.

(*s*) *In re Chinnery's Estate*, 1 L. R. Ir. 296.

applied, that the gift over was not too remote; and that A., having attained twenty-one, took the fee defeasible on his death without issue of the age of twenty-one then living.

By s. 10 of the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), it is enacted as follows:

“Where there is a person entitled to land for an estate in fee, or for a term of years absolute or determinable on life, or for term of life, with an executory limitation over on default or failure of all or any of his issue, whether within or at any specified period or time or not, that executory limitation shall be or become void and incapable of taking effect, if and as soon as there is living any issue who has attained the age of twenty-one years of the class on default or failure whereof the limitation over was to take effect.”

Further restriction by the Conveyancing Act, 1882, of the time within which a limitation of real estate on failure of issue may take effect.

This enactment applies only to instruments coming into operation after the 31st December, 1882; to limitations of land (*t*); and where the issue whose failure is spoken of is the issue of a person to whom the property is limited in fee, for life, or for a term of years absolute or determinable on life (*i. e.*, on the death of some person). It restricts the time within which a limitation on failure of issue within the line of perpetuity may, in the event specified, take effect; but it does not otherwise touch the question of remoteness. Though the Act purports to apply to limitations upon failure of issue not “within or at any specified period or time” such limitations, except, perhaps, in the case of a term with less than twenty-one years to run, or determinable on death (*u*), are altogether void for remoteness, and cannot take effect, though the issue fail before any of them attain twenty-one years.

(*t*) There is no definition of “land” in the Act; but probably that of 44 & 45 Vict. c. 41, s. 2, would apply.

(*u*) See *supra*, p. 193.

CHAPTER XI.

LIMITATIONS VESTED OR CONTINGENT; DEFERRED
ENJOYMENT.**Chap. XI.**

Legacy payable at a future time is vested or contingent according as the time is annexed to the gift or the payment.

And valid or void for remoteness accordingly, if the time is beyond the line of perpetuity.

Direction to pay at a future time rejected as repugnant where there is an absolute gift.

WHERE money is bequeathed and a future time named for its payment the legacy is vested or contingent, that is to say, vested immediately or at the time named for payment, according as the time is annexed to the gift or the payment. If, therefore, the time named is beyond the line of perpetuity, and is annexed to the gift, the bequest will be void for remoteness. But if the time named is not annexed to the gift, but is the time named for payment of a legacy previously given in absolute terms, the direction to pay at a future time is rejected, and the gift remains absolute. It is rejected, not on grounds of remoteness, and whether remoteness is involved or not, because of its repugnancy to the previous gift, which confers the absolute interest. For it is a rule of law that where a person has an absolute vested interest in property, and can give a discharge for it, he is entitled to an immediate transfer notwithstanding any words purporting to restrict the right to possession; and even though the direction is, to pay or transfer at a future time.

The rule was so stated by Malins, V.-C., in a recent case (a) following the well known decision in *Saunders v. Vautier* (b). In the latter case a testator gave a sum

(a) *Hilton v. Hilton*, L. R. 14 Eq. 468, 475.

(b) 4 Beav. 115; 1 Cr. & Ph. 240.

See also *Swaffield v. Orton*, 1 De G. & Sm. 326.

of stock upon trust to accumulate until A. should attain twenty-five, and then to pay and transfer the stock and accumulations to A., his executors administrators and assigns. It was held that A. was entitled to payment and transfer of the whole upon his attaining the age of twenty-one.

A simple application of this rule in connection with the law of remoteness occurs in the case of a gift to the children of a living person, followed by a direction that the property is to be paid, transferred, or enjoyed at an age beyond twenty-one. Such a gift is not void for remoteness (c).

But though a limitation to the children of A., payable at twenty-two, is valid, a limitation to the children of A. at twenty-two is void for remoteness. The former vests immediately, the latter not until a child (who may be unborn at the testator's death) attains twenty-two. From the cases mentioned in the subsequent pages of this Chapter it will be seen that the attempt is frequently made to limit property to an unborn person, or to a class which may include an unborn person, so that it shall not vest until the donee, or one of the donees, attains an age beyond twenty-one. No such limitation can be valid. If the gift is to the children of a living person, including children unborn at the testator's death, the limitation is altogether void for remoteness, unless it must vest when or before the youngest of such children attains twenty-one. The books show that this application of the Rule against Perpetuities is frequently overlooked.

Common mistake of giving to children of living person, to vest at an age beyond twenty-one.

In the case of an absolute gift, followed by a separate and distinct clause directing payment at a future time, there is no difficulty in determining that the time is annexed to the direction to pay, and not to the gift. In other cases the point is not so clear. The rules by which the testator's intention is ascertained, and the time of

(c) See *infra*, p. 208.

Chap. XI. vesting determined, are rules of construction and do not properly fall within the scope of this work. They are fully discussed in the text-books which deal with the subject of construction (c); and it is proposed here to state such of them only as have been illustrated by cases in which the question of remoteness has been involved.

Time of vesting of ambiguous limitations determined without regard to result, as regards remoteness.

Although the general rule is clear, and it has been stated in the plainest terms in many cases, that, upon the question of construction, the result as regards remoteness or otherwise is irrelevant (d), there are nevertheless cases in which established rules of construction have not been applied, where the result of applying them would have been to make the limitation void for remoteness, and apparently for that reason only. The rule, so to construe an instrument *ut magis valeat quam pereat*, has its influence where remoteness is involved, as well as on other occasions where one construction will give effect to the limitation and the other destroy it. In a case where the question was whether a gift vested at birth or at twenty-five it was recognised by Wood, V.-C., as "a further objection" to the construction of a vesting at twenty-five that it would have caused the limitation to fail for remoteness (e).

Gift to the children of A., payable, or to be paid, or transferred, at an age beyond twenty-one, is not void for remoteness.

The following cases illustrate the rule above stated, that a gift to the children of a living person payable, or to be paid, transferred, or divided, at an age beyond twenty-one, is not void for remoteness; the time, in such a case, being attached to the payment and not to the gift of the legacy.

In *Dodson v. Hay* (f) the gift was of residuary real and personal estate to the children of A.; with a super-added direction that each child should be educated with

(c) See 1 Jarman on Wills, 4th ed., 799—863; Theobald on Wills, 2nd ed., 398—423; Hawkins on the Construction of Wills, 221—242.

(d) See pp. 262, *seq.*

(e) *Gostling v. Gostling*, Johns. 265, 274; 5 Jur. N. S. 910.

(f) 3 Bro. C. C. 404.

the income of his share, and that his share should "not be otherwise claimed or inherited, directly or indirectly, until the said children arrive at the age of twenty-two years, whether married or single." It was held that the gift being, in the first instance, absolute, and the words following being intended only to fix the time of payment, the gift was not void for remoteness.

In *Gosling v. Gosling* (g) the testator, after devising by his will real and personal estate in absolute terms to persons (some of whom were unborn) in succession for life and otherwise, added in a codicil that his desire was that no one should be put in possession of his estate, or should enjoy the rents and income thereof, until he should attain the age of twenty-five; and in the meantime the income was to accumulate. It was held by Wood, V.-C., that these expressions related simply to the enjoyment of the property, and did not operate as a revocation of the previous absolute gift.

In *Coventry v. Coventry* (h) there was a gift, by the will of a testator who died in 1855, of real and personal estate, upon trust to accumulate until the year 1875, when the whole was to fall into the residue. The residue was given to A., B., and "all my (the testator's) grandchildren." It was held that the grandchildren living at the testator's death were entitled to the real and personal estate immediately, and free from the trust to accumulate.

In *Packer v. Scott* (i) there was a bequest of personal property, in trust, as and when the child and children of A. should severally attain twenty-one, to pay and divide the same between them and the children of such of them as should die under twenty-one; but so that the children of a deceased child should take, on attaining twenty-one, their parent's share. It was held that the gift to the children was valid; and that it was not made void for

(g) Johns. 265; 5 Jur. N. S. 910. 985.
 (h) 2 Dr. & Sm. 470; 13 W. R. (i) 33 Beav. 511.

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remoteness by the clause directing that the children of a deceased child on attaining twenty-one should take their parent's share.

In *Blease v. Burgh* (*k*) there was a bequest of residue upon trust to accumulate, and upon trust, as to capital and accumulations, for the children of A. other than B., to be paid on their attaining twenty-three; with a gift over in the event of the death of all the children under twenty-three. In *Greet v. Greet* (*l*) there was a trust of residue, after the death of a person who took a life interest, for the children of the tenant for life, with a direction (in effect) that their shares should be paid at twenty-four. In both these cases the gift to the children was held to be vested at birth; and, consequently, not void for remoteness.

Farmer v. Francis (*m*) is a similar case, with reference to real estate. The devise there was upon trust for A. for life, and after her death for all her children then living, equally "to be divided share and share alike when and as they shall respectively attain the age of twenty-four." It was held that all the children living at A.'s death took vested interests, and that the gift was, therefore, not void for remoteness.

A testator (*n*) declared that the bequest to a daughter, A., should be enjoyed by her for life, and he directed that after her death it should be "put in trust for the benefit of the child or children which she may leave, and to be divided in equal proportions between her children and after they have attained the age of twenty-five years." And he "in like manner" directed that the bequest to his other daughter, B., should be enjoyed by her for life, and after her death "that the whole amount may be continued in trust, and may be divided equally between

(*k*) 2 Beav. 221; 9 L. J. Ch. 226.

(*l*) 5 Beav. 123.

(*m*) 2 Bing. 151.

(*n*) *Saumarez v. Saumarez*, 3 Beav. 432.

her children after they have attained the age of twenty-five years." It was held by Lord Langdale that both the gifts to the children were valid; and that the children took interests which vested at birth.

The case is the same when the gift is to A. for life, and after his decease to A.'s children, *as they attain a given age*; with a gift over upon A.'s death without issue then living (o).

A bequest to the children of a living person, to be paid upon their attaining twenty-five, has been held void for remoteness because of a subsequent gift "if but one child, to such child at twenty-five." The gift to the one child being contingent (p), it was held that the preceding gifts were also contingent (q).

A gift over in the event of no child attaining the given age does not prevent vesting meanwhile. In *Davies v. Fisher* (r), and *Blease v. Burgh* (s), gifts to children of A., in terms purporting to defer possession beyond twenty-one, were held to be vested at birth, notwithstanding a gift over, in each case, if no child attained the given age. But it was said by Sir J. Leach, in *Vawdry v. Geddes* (t), that a gift over under the given age rebuts the presumption of vesting which arises from a gift of the income until the given age.

In some cases a gift over, upon the death of the primary donee under the given age *without issue*, has been relied on as showing that the principal gift is vested. Thus in *Bland v. Williams* (u) there was a gift of residue, upon trust to apply the income, or a sufficient part thereof, in

(o) See *Bree v. Perfect*, 1 Coll. 128; 8 Jur. O. S. 282; *Doe d. Dolley v. Ward*, 9 A. & E. 582; 8 L. J. Q. B. 154.

(p) See *infra*, p. 213.

(q) *Judd v. Judd*, 3 Sim. 525; *Hunter v. Judd*, 4 Sim. 455. But *quære* as to this; see *Walker v. Mower*, 16 Beav. 385; *Johnson v.*

Foulds, L. R. 5 Eq. 268; 37 L. J. Ch. 260; *Griffith v. Blunt*, 4 Beav. 248; 10 L. J. Ch. 372.

(r) 5 Beav. 201; 11 L. J. Ch. 338.

(s) 2 Beav. 221; *supra*, p. 210.

(t) 1 R. & M. 203, 208.

(u) 3 M. & K. 411; 3 L. J. Ch. 218.

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the maintenance of the children of the testator's daughters until they should attain twenty-four; and when and as they should respectively attain twenty-four, to pay the residue and unapplied income to the children; with a gift over, if any child should die under twenty-four and without issue, of the share of such child to the other children attaining twenty-four. It was held by Sir J. Leach that the gift over showed that the gift to the children vested in them at birth. The latter gift, therefore, was not void for remoteness (x). *Bree v. Perfect, supra*, is a similar case.

A gift over, upon the death of one of the class under the given age, to the others, followed by a gift over, in case of death leaving issue, to the issue, has been held to show that there is no vesting before the age mentioned. In *Rowland v. Tawney* (y) there was a gift of a sum of money, upon the death of A., to the children of B.; and there was a direction that the legacy which any person should take under the will should "be considered as a vested interest at the age of twenty-five years"; with a gift over of the share of any legatee dying before his legacy became "so vested" to his brothers and sisters, and in case of his leaving issue, to the issue, to be vested and payable in like manner. There was a power of maintenance out of shares to which legatees were "presumptively entitled." The gift was held void for remoteness, there being no vesting before twenty-five. The gift over to issue was relied on, amongst other indications, as showing that the gift vested at twenty-five.

A gift to the children of a living person contingent upon a remote event (the attainment of the age of thirty by one of the children) has been held vested by reason of a gift over "if any such child" should die under thirty. The gift over showing that all the children, and not those

(x) The gift of income until twenty-one does not appear to have been relied on, as showing that the gift

vested at birth.

(y) 26 Beav. 67.

only who attained thirty, were intended to take vested interests (z). Chap. XI.

In *In re Edmonson's Estate* (a) a gift over of shares, which the parents would have taken "if living," to issue, was relied on as showing that the parents took vested interests.

A bequest of personal property to, or upon trust to pay to, an individual or a class, "at," "upon," or "from and after," attaining a given age; or "where," "if," or "as," he or they attain a given age, is contingent. If therefore the gift is to the children of a living person, and the age named is beyond twenty-one, the gift is void for remoteness.

Gift "at,"
"upon,"
"from and
after," or
"when," "if,"
or "as," the
donee attains
a given age.

In *Leake v. Robinson* (b) a testator gave real and personal estate to trustees, upon trusts for the benefit of A. for life, and after his death upon trust to apply the income to the maintenance of the children of A. until they should attain twenty-five or marry, and then to pay and transfer the property to such child or children who (*sic*) should attain twenty-five or marry; with a gift over in the event of A. dying without issue living at his death or attaining twenty-five. It was held that the gift to the children was void for remoteness.

In *Re Bulley* (c) the bequest was upon trust to pay to all the children of a tenant for life as soon as they attain twenty-two, with a gift over of the shares of children dying under twenty-two to such of the other children as should attain twenty-two, and a direction, in the case of a child dying under twenty-two, that the income only of his share should be paid to him until he attained twenty-two. The gift was held to be contingent, and void for remoteness.

A testator (d) devised lands in trust, after A.'s death, and

(z) *Knox v. Wells*, 2 H. & M. 674;
34 L. J. Ch. 150.

(b) 2 Mer. 363.

(c) 11 Jur. N. S. 791.

(a) L. R. 5 Eq. 389; 16 W. R.
890.

(d) *Merlin v. Blagrove*, 25 Beav.
125.

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in case A. should have only one child who should survive her, to pay £200 a year for his maintenance until he should attain the age of twenty-five; and from and after such child should attain that age to raise £10,000 and pay the same to him at that age; or, in case A. should at her death have two or more children, then to raise an annuity for their maintenance until they should respectively attain twenty-five, and when they respectively attained that age to pay each an equal share of the £10,000. A. had one child only, who was begotten but not born at the testator's death. It was held, upon the authority of *Leake v. Robinson*, that the gift was too remote; that it was a gift to a remote class, namely, such of A.'s children living at her death as should attain twenty-five. It was held also, that since the £10,000 was not to be raised until the period for ascertaining the class arrived, the subject matter of limitation was not in existence within the legal period, and that for that reason also the gift was void for remoteness.

Gift by way of direction to trustees to pay, divide, transfer, or convey, at a given age.

Where a gift is in the form of a direction to trustees to pay, transfer, divide, or distribute upon the donee or donees attaining a given age, and there is no gift except in the words directing payment, transfer, or division, the gift vests when the given age is attained, and not before.

In *Chance v. Chance (e)* there was a bequest of personalty upon trust, after the death of the survivor of persons who took life interests, to be divided; one half to be transferred and paid to the children of A. at the age of twenty-five. The gift to A.'s children was held to vest at twenty-five, and therefore to be void for remoteness.

In *Read v. Gooding (f)* there was a devise upon trust for A. for life, and after her death to apply the rents for the benefit of her children until the youngest attained twenty-five, and when the youngest attained twenty-five.

(e) 16 Beav. 572.

(f) 21 Beav. 478.

to sell and pay and divide the proceeds amongst "such of the children of A. as shall be then living, and the issue of such, if any, of her children as may be then dead," the issue to take *per stirpes*. It was held that the gift did not vest in the children of A. living at her death, but that the class was to be ascertained when the youngest attained twenty-five. The gift was therefore too remote.

In *Porter v. Fox* (g) the testator directed the income of his real and personal estate to be accumulated until the time of distribution after mentioned. And he directed his real estate to be sold after the deaths of his wife and son, the proceeds to be invested and remain in the hands of his executors for the benefit of his grandchildren and his nephew, and to be distributed as they should respectively attain twenty-five. And he directed that upon a grandchild, or upon the nephew, attaining twenty-five, an equal share, according to the number of grandchildren then living, should be transferred to the grandchild or the nephew; and so with the other shares. The gift was held void for remoteness, on the ground (apparently) that the direction as to distribution was part of, or constituted, the gift (h).

In *Boughton v. James* (i) there was a limitation of real and personal estate to trustees, upon trust to accumulate the income; and when and as soon as a son of either of the testator's nephews, A. and B., should attain twenty-five, the testator directed a valuation of the whole property, together with the accumulations, to be made, and the whole to be divided into as many shares as there were sons of the two nephews then living. Each son, as he attained twenty-five, was to choose a share, which thenceforth was to be held in trust for him for his life,

(g) 6 Sim. 485.

(h) There was an appeal, which was compromised.

(i) 1 Col. C. C. 26. There was

an appeal on another point, *nom.* *Boughton v. Boughton*, 1 H. L. C. 406.

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with remainder in trust for his children. It was held that the class to take, consisted of all the sons of the nephews living when a son first attained twenty-five; and that the gift was void for remoteness.

So, in the case of real estate, a direction to trustees having the legal estate to convey to a person or to a class to be ascertained at a future time is an executory limitation which does not vest until the time for conveying arrives (*k*).

In *Saumarez v. Saumarez* (*l*) a direction that the trust fund should be divided amongst the children of A. at twenty-five, in like manner with a previous gift to the children of B., was held valid; by reason, it seems, of the reference to the previous gift, which clearly vested at birth.

Gift in terms absolute not contingent by reason of subsequent ambiguous expressions as to vesting.

A gift in terms absolute is not construed as being contingent by reason of subsequent expressions as to the time of vesting which are ambiguous (*m*).

In *Barnet v. Barnet* (*n*) there was a bequest upon trust for a class of issue. By a subsequent clause the trustees were authorised, at their discretion, to pay their shares to such of the issue as were males at any time between their ages of twenty-one and thirty, and meanwhile to maintain them out of the income and accumulate the residue. It was held that the shares vested immediately. And in *In re Edmonson's Estate* (*o*) a direction that shares should not be "so paid to, or become vested interests in," the children of A. (the donees) until they respectively attained twenty-five, was held not to affect an absolute gift to the children.

In *Blease v. Burgh* (*p*), the gift being in terms absolute,

(*k*) *Blagrove v. Hancock*, 16 Sim. 371; 18 L. J. Ch. 20; *In re Finch, Abbiss v. Burney*, 17 Ch. D. 211; 50 L. J. Ch. 348.

(*l*) 34 Beav. 432.

(*m*) See *In re Duke, Hannah v.*

Duke, 16 Ch. D. 112.

(*n*) 29 Beav. 329.

(*o*) L. R. 5 Eq. 389; 16 W. R. 890.

(*p*) Beav. 221; 9 L. J. Ch. 226.

it was held that a subsequent direction to accumulate until the time named for payment, did not defer the vesting until the time of payment. So a gift, absolute in terms, is not affected by a direction to accumulate income until a time subsequent to that at which the gift vests (*q*).

"There can be nothing better settled than that, where a testator directs that an interest is to be vested at one time, he means that it is not to be vested at any other time" (*r*). Express direction as to vesting.

In *Watkins v. Cheek* (*s*) a legacy charged upon land was bequeathed to A., "the same to vest immediately upon my decease, but to be paid on" A. attaining twenty-one. Except for the words as to vesting, this bequest would not have vested until the legatee attained twenty-one (*t*). It was held that it vested at the testator's death.

In *Re Blakemore's Settlement* (*u*) there was a limitation of a term of years to trustees upon trust to raise a sum of £1500 as portions for the children of A. surviving A. & B., "such sum of £1500 to vest in, and be paid and payable to," the children at their ages of twenty-four; with power for the trustees to apply the interest of "expectant or presumptive" shares to maintenance until twenty-four; and a gift over of shares of children dying before acquiring "vested" interests, and of the whole, in the event of all dying before their shares "vested." It was held that the absolute gift in the first instance, to the children surviving A. & B. was cut down by the direction that the £1500 was to "vest in" the children at twenty-four; that the direction as to maintenance out of "expectant or presumptive" shares pointed to the same conclusion, namely, that vesting

(*q*) *Swaffield v. Orton*, 1 De G. & Sim. 326. And see *supra*, p. 206.

(*r*) Per Jessel, M.R., *Selby v. Whittaker*, 6 Ch. D. 239, 247; 47 L. J. Ch 121.

(*s*) 2 S. & S. 199; 3 Sm. & Gif. 362.

(*t*) *Infra*, p. 232.

(*u*) 20 Beav. 214.

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took place at twenty-four. The trust was, therefore, held void for remoteness.

In *Cromek v. Lumb* (x) a gift to the testator's pre-ent and future grandchildren was followed by a proviso (applicable to this and other gifts), that legacies and shares given by the will should vest at twenty-three. The gift was held void for remoteness.

So in *Pickford v. Brown* (y) there was a gift of residuary real and personal estate, upon trust, after the death of B., a tenant for life, for his children, "the share and interest of every son to be vested in him on attaining the age of twenty-five years"; . . . "the said shares" in the meantime to be laid out and applied towards maintenance, education, and advancement; with a gift over to survivors (to be vested in a similar manner) of shares of children dying under twenty-five. The gift was held void for remoteness.

And in *Rowland v. Tawney* (z), above mentioned, an absolute gift, followed by a direction that all legacies were "to be considered as a vested interest at the age of twenty-five years" was held to vest at twenty-five, and not before.

Though an express direction as to the time of vesting is paramount, the word is so often used inaccurately that the question generally arises whether by directing a legacy to vest at a particular time the testator did not mean vest in possession, or vest indefeasibly (a).

Gift of income
until payment
vests the
principal.

A bequest in terms contingent upon the attainment by the legatee of a given age or other future event is nevertheless vested if the whole of the interest in the meanwhile is given to, or for the benefit of, the legatee. The

(x) 3 Y. & C. 565.

(y) 2 K. & J. 426; 25 L. J. Ch. 394; see also *Comport v. Austen*, 12 Sim. 218, a somewhat complicated case, but decided upon the same principle.

(z) 26 Beav. 67; *supra*, p. 212.

(a) See *supra*, p. 42; and see *In re Featherstone's Tr.*, 22 Ch. D. 111, where a direction that legacies should vest at the testator's death was held to mean that only those of the legatees who survived the testator should take.

result is the same whether the gift of interest is direct, or in the form of maintenance (*b*); and whether the interest, up to the given time, is first given, and then the principal, or *vice versa* (*c*). Chap. XI.

A trust to sell real estate at a time which was beyond the line of perpetuity, and to divide the proceeds amongst a class to be ascertained within the legal period, with a gift of the rents and profits until sale to the same class was, in *Goodier v. Johnson* (*d*), held to operate as an absolute gift of the lands to the class, discharged of the trust for sale, which was rejected for remoteness.

So also where there is no express gift of income, but a trust for the legatee until he attains a given age, and then for him absolutely, the gift vests immediately. Whether the gift of income is express or not.

In *Hardcastle v. Hardcastle* (*e*) leaseholds were bequeathed, after the death of a tenant for life, upon trust for all her children, until such children should respectively attain twenty-five, or die leaving issue; and then upon trust for such children so attaining twenty-five or dying leaving issue, equally; with a similar trust in case one child only should attain twenty-five, or die leaving issue; and a gift over if there should be no child, or if all should die under twenty-five, or without issue. It was held that the gift to children was not too remote; that they took interests vested at birth; and that the gift over was void for remoteness.

Though the rule as to a gift of income vesting the corpus is well established, the principle upon which it is Reason for the rule as to a gift of

(*b*) Per Lord Cottenham, *Watson v. Hayes*, 5 M. & Cr. 125, 133; 4 Jur. O. S. 186; cited 1 Sm. & G. 55; *Fox v. Fox*, L. R. 19 Eq. 286; 23 W. R. 314; See, however, *In re Ashmore's Tr.*, L. R. 9 Eq. 99; 39 L. J. Ch. 202; following *Pulsford v. Hunter*, 3 Bro. CC. 416; and the observations of Hall, V.-C., on *Fox v. Fox* in *Dewar v. Brooke*, 14 Ch. D. 529, 532; 49 L. J. Ch. 374; and

see *Goodier v. Johnson*, *infra*.

(*c*) *Hobbs v. Parsons*, 2 Sm. & G. 212; 23 L. T. O. S. 47. Unless perhaps where the age is far beyond twenty-one; see per Jessel, M.R., *In re Bunn*, 16 Ch. D. 47, 48.

(*d*) 18 Ch. D. 441; 51 L. J. Ch. 369.

(*e*) 1 H. & M. 405; 7 L. T. N. S. 503.

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income vesting
corpus.

founded is not so clear. Three reasons have been assigned why, in such a case, the corpus should vest: (1) because, by so dealing with the income, the testator implies that the legatee is entitled to it under the gift of corpus (*f*); (2) because a gift of corpus at a future time, with a gift meanwhile of income, is, in effect, an immediate gift of corpus (*g*); and (3) because "for the purpose of interest, the particular legacy is to be immediately separated from the bulk of the property" (*h*). These various reasons are not, it will be observed, altogether consistent with each other.

Gift to class
with gift of
income of
shares to the
members
respectively.

Where the gift is to a class, there is some difficulty as to a gift of income vesting the corpus. A distinction has been drawn between a gift to a class as tenants in common with a gift of the income of the respective shares to the members of the class until the time for payment of the corpus, and a gift of an entire fund to a class, with a gift of the income of the entire fund for the benefit of the class. In the latter case it has been said that a member of the class who dies before the time for payment does not take. In the former case it is clear that the gift vests immediately.

Thus in *Harrison v. Grimwood* (*i*) a testator directed his residuary estate to be sold; the proceeds to be held, after the death of his daughter, "upon trust to pay, apply, and divide one-third part of the said principal monies unto and amongst all and every" her children, "when and as they should respectively attain the age of twenty-six years," with benefit of survivorship, if any should die under age without issue; and upon trust, if any of the children should be under twenty-one, at the daughter's death, to put out at interest their shares, and, during

(*f*) *Davies v. Fisher*, 5 Beav. 201; 11 L. J. Ch. 338.

(*g*) *Hunson v. Graham*, 6 Ves. 239, 249; and see per Wood, V.-C., in *Pearson v. Dolman*, L. R. 3 Eq.

315; 36 L. J. Ch. 258.

(*h*) Per Sir J. Leach, *Fawdry v. Geddes*, 1 R. & M. 203, 208.

(*i*) 12 Eav. 192; 18 L. J. Ch. 485.

their minority, to apply the interest, or a competent part thereof, towards their maintenances. There was a power of advancement, and a gift over, in case of death under twenty-six without issue. It was held that the children took vested interests, and that the gift was not too remote.

In *Hobbs v. Parsons* (*k*) a testator directed the income of the proceeds of the sale of his real estate to be paid to his two daughters equally for their lives; and after their deaths the capital and interest was "to go to their respective children for their support and maintenance until they shall attain the age of twenty-two years severally; they to receive the principal and interest as they attain such age in equal shares;" with a gift over to the survivors of the shares of any of them dying under twenty-two. It was held that the gift to the children was not void for remoteness.

In *Tatham v. Vernon*, (*l*) the testator gave the residue of his estate, after the death of his wife, to his children equally; as to daughters' shares upon trust for them respectively for life, and after the death of each daughter "upon trust to pay and divide her share amongst her children equally at their several ages of twenty-five years; and in the meantime the interest and dividends of such daughter's share to go and be applied in the maintenance, support, and education, of such child's issue during his, her, or their respective minorities in equal portions." It was held that the gift to daughters' children vested immediately, and was not too remote.

A testator (*m*) directed his trustees to divide and transfer a fund amongst the children of T., as and when they should respectively attain twenty-five; "apply-

(*k*) 2 Sm. & G. 212; 23 L. T. O. S. 47.

(*l*) 29 Beav. 604; 4 L. T. N. S. 531.

(*m*) *Fox v. Fox*, L. R. 19 Eq. 286;

23 W. R. 314. See the observations of Hall, V.-C., on this case in *Dewar v. Brooke*, 14 Ch. D. 529, 532; 49 L. J. Ch. 374,

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Gift to a class equally at a given age, with gift of income of the fund for the benefit of the class meanwhile.

ing from time to time the income of the presumptive share of each child, . . . or so much thereof respectively as the trustees or trustee for the time being should think proper, to and for his and her maintenance and education until such share should become payable as aforesaid." It was held by Jessel, M.R., that the gift was vested, and not too remote.

It has been said that where the gift is, of an entire fund, payable to a class equally on their attaining a given age, a direction to apply the income of the whole fund in the meantime for their maintenance, has not the effect of vesting the shares of members of the class who die before that age (*n*). The cases do not appear to support this distinction.

In *Bell v. Cade* (*o*) there was a bequest of £2000 upon trust, after the death of A. (who took a life interest), to pay and divide the same amongst the children of A. on attaining twenty-four; and in the meantime the interest to be applied for the use and benefit of such children. It was held that, by reason of the direction as to maintenance, the gift to the children vested at birth, and was not too remote.

In *Davies v. Fisher* (*p*) there was a bequest upon trust after the death of A. (who took a life interest), for the children of A. "as they severally attain" twenty-five; the income to be applied during their respective minorities for their respective maintenance; with a gift over in case no child attained twenty-five. The gift was held to be vested and not too remote. In *re Grove's Trusts* (*q*), and *Boulton v. Pilcher* (*r*), are similar cases, except that no question of remoteness was involved.

(*n*) Per Jessel, M.R., *In re Parker, Barker v. Barker*, 16 Ch. D. 44, 46. See also *In re Ashmore's Tr.*, L. R. 9 Eq. 99; 39 L. R. Ch. 202; per James, V.-C., and per Wood, V.-C., in *Lloyd v. Lloyd*, 3 K. & J. 20.

(*o*) 2 J. & H. 122; 31 L. J. Ch. 383.

(*p*) 5 B. 201; 11 L. J. Ch. 338.

(*q*) 3 Giff. 575; 28 L. J. Ch. 556.

(*r*) 29 Beav. 633; 9 W. R. 626.

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Where there is a gift to a class to be ascertained at a future time, a gift of the income, as a common fund, for the benefit of all the contingent members of the class for the time being, until the ascertainment of the class, does not vest the corpus. This was the case in *In re Hunter's Trusts* (s), *In re Grimshaw's Trusts* (t), and in *Lloyd v. Lloyd* (u). In the last mentioned case there was a trust to apply rents to maintain a class of children until the youngest attained a given age, and then to sell and divide the proceeds (in effect) amongst such of the children as were then living. It is obvious that a child who died before the youngest attained the given age took no interest in the corpus, vested or otherwise (x).

Gift to a contingent class with gift of income meanwhile to members for the time being.

But though a gift to a class to be ascertained at a future time cannot vest until the class is ascertained, there is no reason why a gift to the children of A. at their age of twenty-two, with a gift of the income meanwhile for the benefit of such children, should not vest immediately if such is the intention (y).

A gift of income by way of direction to trustees to accumulate it, or apply it for the benefit of the legatees, as they think fit, is held to be no sufficient indication of an intention to vest the corpus.

Direction to accumulate income or apply it for benefit of legatees.

In *Pickford v. Brown* (z) there was a gift to children of the testator's daughter, the shares to be vested at twenty-five; with a direction that the income of the children's shares should be applied in their maintenance or advancement or be accumulated at the discretion of the trustees. It was held that the gift vested at twenty-five, and was void for remoteness, both as to income and capital.

(s) L. R. 1 Eq. 295.

(t) 11 Ch. D. 406; 48 L. J. Ch. 399.

(u) 3 K. & J. 20.

(x) See *infra*, p. 226, *Dewar v. Brooke*, 15 Ch. D. 529.

(y) *In re Parker, Barker v. Barker*, 16 Ch. D. 44; Jessel, M.R., appears to have considered the class to be contingent; *sed qu.*

(z) 2 K. & J. 426; 25 L. J. Ch. 702.

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In *Vawdry v. Geddes* (a) the testatrix gave the interest of her residuary estate to her four sisters for life, and directed that upon their deaths the interest on their respective shares should at the discretion of the executors be applied to the maintenance or be accumulated for the benefit of the children of each of them so dying until the children should respectively attain twenty-two; "and upon their (the childrens') attainment to that age, they to be entitled to their mother's share of the principal;" with gifts over upon death under twenty-two. The gift to children was held void for remoteness.

Direction to apply so much of income as trustees think fit to maintenance.

It seems that an express direction to trustees to employ so much of the income as they think fit towards maintenance is conclusive to show that during minority the legatees are not entitled to the whole income; and consequently that they do not take vested interests (b). But it is otherwise where the direction is that the trustees shall pay the whole or such part of the income as they shall think fit; there being also a gift to the legatee of the whole of the income (c).

Gift of income may be good and gift of corpus void for remoteness.

The gift of income may be so separated and distinct from that of the corpus that, without having the effect of vesting the corpus, it is a valid gift of income; whilst the gift of corpus is void for remoteness. Thus in *Gooding v. Read* there was a gift by will of the rents of real estate for the benefit of the children of A. until the youngest attained twenty-five, followed by a trust to sell the lands and divide the proceeds amongst the children of A. then living. It was held that the gift of the rents was valid (d); and that of the land void for remoteness (e).

(a) 1 R. & M. 203. The gift over was relied on by Sir J. Leach as showing that there was no vesting before twenty-two.

(b) See per Wood, V.-C., *Hardcastle v. Hardcastle*, 1 H. & M. 405, 410; 7 L. T. N. S. 503,

(c) See per Jessel, M.R., 16 Ch. D. 46; *supra*, p. 222.

(d) *Gooding v. Read*, 4 D. M. & G. 510.

(e) *Read v. Gooding*, 21 Beav. 478.

A gift of an annual sum is not equivalent to a gift of interest, so as to vest the corpus. In *Boughton v. James* (f) there was a bequest upon trust to pay £40 yearly for the use of daughters of A. born in the testator's life or, afterwards, until they should respectively attain twenty-five or be married with consent of persons named in the will; and upon their respectively attaining twenty-five or marrying as aforesaid, in trust to pay each of them £1500. It was held that, as to daughters born after the testator's death, the gift of the £1500 was too remote.

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Gift of annual sum not equivalent to gift of interest.

A gift of the principal and interest in the same terms at a future time does not vest, as to the capital, before the given time, by reason of the gift of interest. It is only when the gift of interest is immediate that it can have the effect of vesting the corpus.

Gift of principal and interest together at a remote time.

In *Chance v. Chance* (g) the testator gave the interest on a sum of Consols to persons successively for life, and after the death of the survivor he gave the principal "to be divided into two equal half parts or shares, and one such half part or share to be transferred or paid unto and equally divided between all the children of my said son A. at the age of twenty-five years, with all interests and dividends thereon." The gift was held void for remoteness.

Whether a gift of interest during "minority," when the gift of corpus is contingent upon attaining an age beyond twenty-one, will have the effect of vesting the corpus, is doubtful. In *Davies v. Fisher* (h), and *Tatham v. Vernon* (i), gifts to the children of a living person, contingent upon their attaining an age beyond twenty-one, were held to be valid in consequence of gifts of the

Gift of income during "minority," and of corpus at twenty-two.

(f) 1 Coll. C. C. 26. *Boughton v. Boughton*, 1 H. L. C. 406, is an appeal on another part of this case.

57 L. J. Ch. 74.

(h) 5 Beav. 201; 11 L. J. Ch. 338.

(g) 16 Beav. 572; and see *Patching v. Barnett*, 49 L. J. Ch. 665;

(i) 29 Beav. 604; 4 L. T. N. S. 531.

Chap. XI. interest during "minority." But, unless "minority" can be read as meaning "until the time for payment of the corpus," it seems that there will be no vesting (*k*). In *Milroy v. Milroy* (*l*) there was a gift of interest for the benefit of the children of a living person during "minority," and a trust, when the youngest attained twenty-five, to pay interest and principal to the children equally. The language of the will is confused, but there are indications that "minority" referred to the attainment of the age of twenty-five. The gift was held valid.

Gift to a class to be ascertained at a future time, with gift of interest until class ascertained.

A gift to a class to be ascertained at a future time vests when the class is ascertained, and not before. It is immaterial that the interest is given meanwhile to or for the benefit of the persons who for the time being are contingent members of the class. There can be no vesting until the members of the class and also the shares in which they take are ascertained (*m*).

In *Thomas v. Wilberforce* (*n*) there was a gift by will of real and personal estate in trust (after the death of a life tenant) for all the children of the tenant for life who should attain twenty-two, with power during minority to apply towards his maintenance the income or fund to which each child should be entitled. The gift was held void for remoteness.

In *The Marquis of Bute v. Harman* (*o*) the testator bequeathed £50,000 upon trust for A. for life, and after her death upon trust to assign the same unto such children of A. as should attain twenty-five, "the right or share

(*k*) See per Wood, V.-C., *Pearson v. Dolman*, 36 L. J. Ch. 258; L. R. 3 Eq. 315, 321. *Thomas v. Wilberforce*, 31 Beav. 299, is not conclusive, because there the class was too remote.

(*l*) 14 Sim. 48; 8 Jur. O. S. 234.

(*m*) See *supra*, p. 85.

(*n*) 31 Beav. 299; see also *Bull v. Pritchard*, 1 Russ. 213; 5 Ha.

567; 16 L. J. Ch. 185; *Dodd v. Wake*, 8 Sim. 615; *Newman v. Newman*, 10 Sim. 51; 8 L. J. Ch. 354; *Gooding v. Read*, *supra*.

(*o*) 9 Beav. 320. The report here is incorrect as to the validity of the gift. See *Southern v. Wollaston*, 16 Beav. 166; 22 L. J. Ch. 664; *Boreham v. Bignall*, 8 Ha. 131, 133, note (*d*).

of such child or children respectively to be a vested interest and transmissible to his, her, or their personal representatives notwithstanding his, her, or their subsequent death in the lifetime of the said A." There followed a power for the trustees during minority to apply the whole or any part of the income of "their expectant shares" in maintaining the children respectively. It was held that the gift to the children was void for remoteness.

In *Ring v. Hardwick* (p) there was a gift to children "who shall live to attain the said age of twenty-five years" of certain of the testator's daughters. The gift was held void for remoteness, notwithstanding clauses for maintenance and advancement out of "the shares" of the children.

In *Blagrove v. Hancock* (q) the testator devised real estate to trustees in trust to apply the rents for the maintenance and support of his wife and his present and future grandchildren during the life of his wife; and on her death to convey the same to "all my present and future grandchildren as they respectively attain the age of twenty-five years" as tenants in common. It was held that the trust to convey was void for remoteness.

Where the gift is to a class of children when the youngest attains a given age, the class to take is ascertained when the youngest child attains the given age; and no child who fails to attain the given age takes. In such a case a gift of interest, until the youngest child attains twenty-one, for the benefit of the children, does not enlarge the class, or accelerate the vesting, so as to enable a child attaining twenty-one, and dying before the youngest attains twenty-one, to take (r). If, therefore, the period for ascertaining the class is too remote, a gift of interest meanwhile will not make the gift valid.

(p) 2 Beav. 352; 4 Jur. O. S. 242.

(q) 16 Sim. 371; 18 L. J. Ch. 20.

(r) *Lloyd v. Lloyd*, 3 K. & J. 20.

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It appears that in such cases a direction to apply the interest to maintenance of the children "during their minority" means until the youngest child attains twenty-one (s).

A gift, at a future time, to such of a class as attain a given age, with a direction for payment when the youngest attains the given age, may mean that payment is not to be made before that time, and not that the shares of all the children then living are then to vest; so as to enable a child then living and afterwards dying under the given age to take (t).

Trust to accumulate until remote period and then to pay capital and accumulations to a class to be then ascertained.

To a gift upon trust to accumulate income until a remote event, and then to pay capital and accumulations to a class to be then ascertained, is void for remoteness. In *Palmer v. Holford* (u) there was a bequest of a fund upon trust to accumulate, and to transfer the whole fund and accumulations to the children of a living person who should be living at the expiration of twenty-eight years from the testator's death other than an eldest or only son. The gift was held void for remoteness. And a gift upon trust for the children of a living person until they attain twenty-two, and then for such of them as attain twenty-two, would fail for remoteness (x); nor would a gift of income meanwhile assist, for none but children attaining twenty-two can take (y).

On the other hand where the persons to take are clear, and the class is ascertained within the legal period, words of seeming contingency will not alter the class and the time of vesting, so as to import remoteness into the limitation (z).

(s) *Lloyd v. Lloyd*, 3 K. & J. 20.

(t) *Dewar v. Brooke*, 14 Ch. D. 529; 49 L. J. Ch. 374.

(u) 4 Russ. 403.

(x) See *Hardcastle v. Hardcastle*, 1 H. & M. 405, 411; 7 L. T. N. S. 503.

(y) *Dewar v. Brooke*, 14 Ch. D. 529; 49 L. J. Ch. 374.

(z) See *Picken v. Matthews*, 10 Ch. D. 264; 48 L. J. Ch. 150; *Boughton v. James*, 1 Coll. 26, 43; and *supra*, pp. 67, *seq.*

A legacy in terms contingent and too remote has been held valid by reason of a direction to sever and set apart from the testator's estate before the legacy becomes payable, and within the line of perpetuity, a sum to answer the legacy.

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Direction to sever and set apart from testator's estate a sum to answer legacy given upon remote contingency.

In *Greet v. Greet* (a) there was a direction to trustees, after the death of a tenant for life who was childless, to set apart a sum of £5000, to be invested in the names of the eldest son of the tenant for life and two trustees, and to accumulate the income for such son "at his attaining the age of thirty years." It was held that the gift to the son was not too remote.

In applying rules of construction to ascertain the time of vesting regard must be had to the subject matter of limitation. The same words will, in some cases, produce opposite results, as regards remoteness, according as the limitation is of real or personal estate. Where there is a difference, it is usually (b) in favour of the vesting of real estate; so that a limitation of realty may be valid, while a limitation in the same words of personalty would be void for remoteness.

Rule of construction as to vesting differs according as the subject of limitation is real or personal estate.

Thus a bequest of personal property in trust for the eldest son of A., a bachelor, when he attains twenty-two, and until he attains twenty-two in trust for B., is void for remoteness as to the son of A., because it does not vest until he attains twenty-two. A similar devise of real estate is valid because it vests immediately. *Boraston's case* (c) established the rule that a devise to A. when he attains a given age, and until he attains the given age, to B., confers a vested estate on A. By virtue of this rule the devise in *Jackson v. Majoribanks* (d), which would otherwise have been void for remoteness, was held valid.

In that case a testator gave real and personal estates to

(a) 5 Beav. 123.

(c) 3 Co. 21, a, b.

(b) As to a future gift of residuary personalty, see *infra*.

(d) 12 Sim. 93; 5 Jur. O. S. 885.

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trustees upon trust to invest the personal estate in the purchase of land, and to pay the rents, subject to certain annuities, to his son for life; and, in case the son should die leaving no legitimate issue, to pay the rents to the testator's widow for life; but in case the son should die leaving legitimate issue then "at the end of six months after the eldest male child then living of the body lawfully begotten of his said son, A., should have attained the age of twenty-five years," to convey, assign, and transfer all his estates, together with rents, unto such eldest male child and the heirs of his body. The testator then provided for the maintenance of the child out of the rents, in case the son should die during the minority of such child, until the child should attain twenty-five. And he directed that in case the son should not die during the minority of the eldest male child, the estates should continue on the trusts aforesaid until six months after the son's death, and then pass to the eldest male child in manner before expressed. It was held that the case was within the authority of *Boraston's case*, and that the gift to the eldest male child of the son was not void for remoteness.

In *James v. Lord Wynford* (e) freehold and leasehold estates were devised upon trust (after certain trusts that failed) to receive the rents and apply them for the benefit of the testator's daughter's son, R., and all other sons she should have, until he and they should attain the age of twenty-five; and on their attaining twenty-five, in trust for their heirs, executors, administrators, and assigns; with a gift over in default of sons, or upon their death under twenty-five. It was held that the gift to R., and the other sons, was vested and not too remote; and that R., the only son, having attained twenty-five took absolutely.

(e) 1 Sm. & G. 40; 22 L. J. Ch. 450. The devise would, it seems, be valid independently of *Boraston's case*,

upon the principle of the decision in *Hardcastle v. Hardcastle*, *supra*, p. 96.

James v. Lord Wynford also illustrates the rule that where freehold and leasehold estates are included in the same gift, and the words of the gift create an immediately vested interest in the freeholds, the leaseholds are also vested (*f*). Chap. XI.
Gift in the same words of freeholds and leaseholds.

Analogous to the rule in *Boraston's case* is that of *Edwards v. Hammond* (*g*)—that a devise of real estate to A., if or when he attains twenty-one, with a gift over in the event of his death under twenty-one, confers upon A. a vested estate. The effect of this rule as regards remoteness is illustrated by *Doe d. Dolley v. Ward* (*h*). In that case there was a devise of freeholds to the testator's daughter for life, remainder to "such of her children as she now has or may have, if a son or sons at his or her ages of twenty-three" in fee; and, in case of the death of any son under twenty-three, his share was to go to the survivors at twenty-three; the rents to be applied to maintenance until the sons attain twenty-three; with a gift over if all the sons die under twenty-three. It was held that the daughter's children took interests vested at birth, and that the gift was not too remote. The rule in *Edwards v. Hammond*.

The rules in *Boraston's case* and *Edwards v. Hammond* apply whether the limitation is to A. "if," or "when," he attains the given age, or "at," "upon," or "from and after" the given age; whether it is immediate, or by way of executory trust; and whether it is to an individual or to a class (*i*). But they do not apply where the attainment of the given age is part of the description of the devisee; as where the gift is to such of the children of A.

(*f*) See *Farmer v. Francis*, 2 S. & S. 505; S. C. 2 Bing. 151; *Tapscott v. Newcombe*, 6 Jur. O. S. 755; and per Stuart, V.-C., 1 Sm. & G. 59, 60.

(*g*) Bos. & Pul. N. R. 324, note.

(*h*) 9 A. & E. 582; 8 L. J. Q. B. 154; following *Doe d. Roake v. Nowell*, 1 M. & S. 327, and *Randall*

v. Roake, 5 Dow, 202.

(*i*) *Edwards v. Hammond*, 1 B. & P. N. R. 324, n.; *Bromfield v. Crowder*, 1 B. & P. N. R. 313; *Doe v. Nowell*, 1 M. & S. 327; *nom. Randall v. Doe*, 5 Dow, 202; *Phipps v. Ackers*, 9 C. & F. 583; 6 Jur. O. S. 745; *Doe d. Cadogan v. Ewart*, 9 A. & E. 636; 7 L. J. Q. B. 177.

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as attain twenty-two (*j*). And they have never been applied to a gift of realty and personalty together (*k*).

In *Patching v. Barnett* (*l*) a testator devised real estate unto and to the use of trustees, their heirs and assigns, upon trust to permit his wife to receive the rents during her life; and after her death, subject to certain trusts for accumulating the rents in the meantime, so long as the same could legally operate, to stand possessed of the real estate in trust for the youngest grandson of A. who should be living at the death of the testator's wife, and who should then have attained, or who should live to attain the age of twenty-five years, for life; and after his death for his first and other sons in tail male. At the death of the widow the youngest grandson of A. had attained twenty-one but not twenty-five. It was held that the gift to the grandson did not vest until twenty-five, and therefore was void for remoteness.

Legacies
charged on
land.

A legacy charged on land does not, as a general rule, vest until the time for payment. Thus the bequest to A. of a legacy charged on land, and payable at twenty-one, is contingent until A. attains twenty-one (*m*); and that whether interest is given meanwhile or not (*n*). But there is an exception to the general rule where the payment is postponed "for the convenience of the estate," and not from considerations personal to the legatee (*o*).

Rules applic-
able to legacies
payable out of
real and per-

Legacies payable out of real and personal estate follow the rules as to vesting which are applicable to personal estate, so far as the personalty extends; and those ap-

(*j*) *Festing v. Allen*, 12 M. & W. 279; 5 Ha. 573; 13 L. J. Ex. 74; *In re Finch, Abbiss v. Barney*, 17 Ch. D. 211; 50 L. J. Ch. 348; *Patching v. Barnett*, 49 L. J. Ch. 665; 51 L. J. Ch. 74.

(*k*) *Per Cotton, L.J.*, 17 Ch. D. 230.

(*l*) 49 L. J. Ch. 665; 51 L. J. Ch.

74.

(*m*) *Remnant v. Hood*, 2 D. F. & J. 396; 30 L. J. Ch. 71.

(*n*) *Parker v. Hodgson*, 1 Dr. & Sm. 568; 30 L. J. Ch. 590.

(*o*) *King v. Withers*, Ca. t. Talb. 117; *Remnant v. Hood, ubi supra*; *Evans v. Scott*, 1 H. L. C. 43; 11 Jur. O. S. 291.

plicable to realty, so far as the realty has to be resorted to (p). Chap. XI.

Legacies payable out of the proceeds of land directed to be sold follow the rules applicable to personal estate (q). sonal estate or the proceeds of the sale of lands.

Where real and personal property are devised together, with a direction to invest the personalty in the purchase of land, the rule of construction which governs the devise of the land is applicable to the gift of the personalty (r). To a gift of realty and money to be laid out in land.

And the case is the same with a devise in the same terms of freeholds and leaseholds (s). But it appears that the rule in *Boraston's case* would not be applied to a gift of realty and personalty in the same words (t). To a gift of freeholds and leaseholds.

There is no reason to doubt that all the rules above stated, by which the vesting of limitations is made to depend upon the subject matter of limitation, apply whether remoteness is involved or not. Some of the rules stated upon pages 232, 233, have not, to the writer's knowledge, been illustrated by cases in which the question of remoteness has arisen. But since they materially affect the application of the rules stated in the earlier part of this chapter it has been thought convenient that they should be here stated.

(p) *Duke of Chandos v. Talbot*, 2 P. W. 601; *Prowse v. Abingdon*, 1 Atk. 482.

(q) *In re Hart's Trusts, Ex parte Block*, 3 De G. & J. 195.

(r) *Jackson v. Majoribanks*, 12

Sim. 93; 5 Jur. O. S. 885.

(s) See *James v. Lord Wynford*, 1 Sm. & G. 40; 22 L. J. Ch. 450, *supra*, p. 230.

(t) See *supra*, p. 232.

CHAPTER XII.

POWERS; THEIR VALIDITY WITH REGARD TO REMOTENESS;
LIMITATIONS IN EXERCISE OF POWERS.

Chap. XII.

Powers void
for remote-
ness.

A POWER may be void for remoteness in (1) the scope or purpose of the power, (2) the subject matter, (3) the donee, (4) the objects, (5) the origin, (6) the duration and (7) the time at which the power is exerciseable. Whether a power purporting to authorise limitations which would be void for remoteness is altogether void, or whether it is valid so far as it is capable of being exercised without transgressing the Rule against Perpetuities, is not clear. Generally speaking, such a power is altogether void; but, as in the case of limitations of property, the question appears to be one of expression. If the context permits, a power may sometimes be read as consisting of two or more distinct powers, one or more of which are valid, and the others void for remoteness (a).

Power of
which the
purpose is to
create a per-
petuity.

A power of which the aim and purpose is to create a perpetuity—to render the property inalienable beyond the legal period—is simply void (b).

In the *Duke of Marlborough v. Godolphin* (c) the testator directed the trustees of his will, by which real estate was settled in strict settlement, upon the birth of

(a) See *Attenborough v. Attenborough*, 1 K. & J. 296; 25 L. T. O. S. 155; and see *infra*, p. 240.

(b) Sugd. Pow., 8th ed., 151.

(c) 1 Eden, 404; *nom. Spencer v. Duke of Marlborough*, 5 Bro. P. C. 592.

each successive tenant in tail, to revoke the uses of the will, and to limit the estates to such tenant in tail for his life, with remainder to his sons in tail. The power to revoke was by Lord Northington held void as tending to a perpetuity and repugnant to the estate limited by the will.

So a trust, antecedent to an estate tail, to raise a sum out of the land upon alienation of the land by any tenant in tail, was held void, as being a device to prevent alienation and inconsistent with the rights of the tenant in tail (*d*). A power for a like purpose would be equally void.

As regards the donee and the subject matter of a power, there is no difference, so far as remoteness is concerned, between a limitation of property and the creation of a power. A power exercisable by a person to be ascertained at a remote period is void for remoteness for reasons similar to those which make a limitation of property to such a person invalid. The like observation applies to powers, of which the subject matter is not ascertainable within the legal period (*e*). A power to appoint the proceeds of a sale to be made at a period that is too remote would probably be held void. In a recent case (*f*) it was held that a gift of the proceeds of a sale, to be made under a trust that was void for remoteness, was invalid. In *Blight v. Hartnoll* (*g*) there was a power for the testator's daughter to appoint the proceeds of a sale, to be made when certain mortgages were paid off, amongst such of the testator's present and future grandchildren as should then be living. It was held void for remoteness in the objects. It would appear to have been also void for remoteness in the subject matter.

Remoteness in the subject matter of a power.

(*d*) *Mainwaring v. Baxter*, 5 Ves. 457.

(*e*) See *Mertin v. Blagrove*, 25 Beav. 125.

(*f*) *Goodier v. Johnson*, 18 Ch. D. 441; 51 L. J. Ch. 369. In this

case it was held that the objects of the power took the property because of a trust of the rents until sale in their favour.

(*g*) 19 Ch. D. 294; 49 L. J. Ch. 255.

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Remoteness in
the donee.

A power exerciseable by will only is void for remoteness, if the donee is a person unborn at the creation of the power. It is immaterial that he is a person who must be born within the legal period, and therefore a person to whom property could be well limited (*h*). But a general power of appointment exerciseable by deed or will may be limited to an unborn person, provided he is to be born within the legal period (*i*). Such a power is valid because it is rather "in the nature of property" than a power (*k*). But such a power, if it is exerciseable only with the consent of a stranger (*l*), or if, when exercised, it takes effect upon a contingent event, as, for example, upon the marriage of the donee (*m*), fails for remoteness. The result would probably be the same if the power arose upon a contingent event, or was exerciseable during part, only, of the life of the donee.

Remoteness in
the objects of
the power.

A power of appointment is not void for remoteness because the objects are not in terms confined within the perpetuity limit; or because a limitation might be framed which would be at once consistent with the terms of the power, and, at the same time, void for remoteness. Thus under a power to appoint to issue, generally, a valid appointment may be made to issue born within the line of perpetuity (*n*). So a power to appoint to an unborn female may be valid, though an appointment to her for her separate use, without power of anticipation, is void for remoteness as to the restraint upon anticipation (*o*). And a power authorising an appointment for life, with power to appoint the corpus by will, is valid and free from objection

(*h*) *Wollaston v. King*, L. R. 8 Eq. 165; 38 L. J. Ch. 61; *ib.* 392.

(*i*) *Bray v. Bree*, 2 Cl. & F. 453; 8 Bl. N. S. 568.

(*k*) Sugden on Powers, 8th ed., 683.

(*l*) As in *Webb v. Sadler*, 14 Eq. 533; 8 Ch. 419; 42 L. J. Ch. 103; *ib.* 498.

(*m*) *Morgan v. Gronow*, L. R. 16 Eq. 1; 42 L. J. Ch. 410.

(*n*) Sugden on Powers, 8th ed., 396, 397; *Routledge v. Dorril*, 2 Ves. 357; *Stark v. Dakyns*, *infra*; *Attenborough v. Attenborough*, 1 K. & J. 296.

(*o*) See *infra*.

on the ground of perpetuity (*p*), although an exercise of it in favour of a person unborn at its creation, for life, with power for the tenant for life to appoint by will, would be void for remoteness as to the power to appoint by will (*q*).

In *Attenborough v. Attenborough* (*r*) a power to advance a sum of money not exceeding £5000 to A., or all or any of his children, exerciseable by the trustees for the time being of the will, was held by Wood, V.-C., to be good as to A., though, perhaps, void as to his children. "The power of appointment to the trustees of the will to advance £5000 out of one moiety of the residue to the testator's nephew (A.), or all or any of his children, is not void for remoteness, with respect to its objects; because those may be selected to whom a valid appointment in this respect may be made; and the nephew (A.), the only object named, is, of course, within the rule."

But a power to appoint to objects, none of whom are necessarily ascertainable within the legal period, is altogether void. Thus a power to appoint to, or to divide amongst, such of the testator's (donor of the power) present and future grandchildren as are living when certain incumbrances existing on the property subject to the power are paid off, is void, and cannot be exercised even in favour of grandchildren living at the testator's death (*s*). So a power to divide amongst the present and future children of a living person who attain twenty-two would, it is submitted, be altogether void for remoteness.

If some of the objects of the power are, and others are not, within the line of perpetuity, and the power is not exclusive, or if it requires a share to be appointed to each

(*p*) *Slark v. Dakyns*, L. R. 15 Eq. 307; *ib.* 10 Ch. 35; 42 L. J. Ch. 524; 44 L. J. Ch. 205.

(*q*) *Wollaston v. King*, L. R. 8 Eq. 165; 38 L. J. Ch. 61, 392; *Morgan v. Gronow*, *Slark v. Dakyns*, *ubi supra*.

(*r*) 1 K. & J. 296.

(*s*) See *Blight v. Hartnoll*, 19 Ch. D. 294; 49 L. J. Ch. 255. It is not clear whether in this case Fry, J., considered the power, or the appointment, or both the power and the appointment, to be void for remoteness.

Chap. XII. of the objects (*t*), the power would seem to be altogether void (*u*).

Remoteness in the origin or creation of the power.

A power limited to arise upon a future or contingent event must be distinguished from a power which takes effect upon a future event, but is presently exerciseable. The former is not exerciseable before the event, upon which it is limited to arise, happens (*x*), and is, it seems, altogether void, unless the event is such that it must happen within the legal period (*y*). In *Goodier v. Johnson* (*z*) it was said by Jessel, M.R., that a trust to sell after the death of the testator's son's widow (the son being unmarried at the time) was void for remoteness. A power to sell upon the same event would, it seems, be void for the same reason.

Whether a power to arise upon a future event, but exerciseable only by a person living at the date of the instrument creating the power, can be void for remoteness, is not clear. Since it cannot arise unless the event happens within the legal period (the lifetime of the donee), it is difficult to see how it can be too remote. In *Blight v. Hartnoll*, above mentioned, Fry, J., seems to have considered the power of appointment void, whether exerciseable before the sale or not. There was in that case (1) power for the executors to sell a wharf when the mortgages upon it were paid off; (2) power for the testator's daughter to appoint the proceeds of sale amongst such of the testator's grandchildren as should be living at the time of sale. No time was limited for the payment of the mortgages. It would seem that the power of sale, being limited to arise

(*t*) See 37 & 38 Vict. c. 37.

(*u*) In 1 Chance on Powers, 124, a doubt is suggested as to this; *sed quære*.

(*x*) See Sugd. Pow., 8th ed., 266, 843; *Want v. Stallibrass*, L. R. 8 Ex. 175; 29 L. T. N. S. 293; *Earle v. Barker*, 11 H. L. C. 280; *Morgan v. Gronow*, L. R. 16 Eq. 1; 42 L. J. Ch. 410; as to Elizabeth's power to

appoint on marriage.

(*y*) See *Bristow v. Boothby*, 2 S. & S. 465; *Mainwaring v. Baxter*, 5 Ves. 457; *Duke of Marlborough v. Godolphin*, 1 Ed. 404; *nom. Spencer v. Duke of Marlborough*, 2 Bro. P. C. 592.

(*z*) 18 Ch. D. 441; 51 L. J. Ch. 369.

upon an event which might happen at any distance of time, was void for remoteness. This does not appear to have been considered. As to the power of appointment it was held that (1) it was void for remoteness in its objects (*a*); (2) that it was not exerciseable before the sale was made. Assuming the second point to have been rightly decided (*b*) the power would seem to have been valid as regards perpetuity. It was, in effect, a power for the daughter, if the mortgages should be paid off in her lifetime, and after they were paid off, to appoint the proceeds of sale (to be made when the mortgages were paid off) to such of the testator's grandchildren as should then be living.

A power which, when exercised, takes effect upon a future or contingent event, is exerciseable either immediately or only after the event, according to the terms of its creation (*c*). Whether exerciseable immediately or not, the power would, it seems, be void for remoteness, unless the event, upon which a limitation in exercise of the power takes effect, must happen, if at all, within the line of perpetuity. For until that event happens the ownership of the property is in suspense. A power for a person unborn at its creation, by deed executed before or after marriage, to declare the trusts upon which property should be held after marriage, was held void for remoteness (*d*).

A power so limited that it may endure, and consequently suspend the absolute ownership of the property, for more than a life or lives in being and twenty-one years afterwards, is absolutely void. Thus if lands were limited in fee, with a power of sale in a stranger, or his heirs, exerciseable at any time, the power would be void for remoteness (*e*). It cannot be exercised at all; even in favour of

(*a*) But see *supra*.

(*b*) But *quære* as to this.

(*c*) See Sugd. on Powers, 8th ed., 262, 263, 269; *Eden v. Wilson*, 4 H. L. C. 257, 283.

(*d*) *Morgan v. Gronow*, L. R. 16 Eq. 1; 42 L. J. Ch. 410.

(*e*) See per Romilly, M.R., *Taite v. Swinstead*, 26 Beav. 525; 33 L. T. O. S. 312.

Chap. XII. objects who are not too remote; or at a time which is within the line of perpetuity.

The question has been much discussed whether powers of sale and similar powers exerciseable over real property in settlement are necessarily void altogether, because they purport to be exerciseable beyond, as well as within, the line of perpetuity (*f*). It seems that they are void altogether, if too remote in part (*g*). In this respect they resemble trusts to accumulate rents of real estate limited in strict settlement, during successive minorities of tenants in tail without limit (*h*), and other limitations capable of operating both within and without the line of perpetuity (*i*). It has been suggested that powers of sale and exchange in settlements, and a power such as that in the *Duke of Marlborough's case* (*k*), upon the birth of every son of A. (such sons being tenants in tail in a strict settlement) to revoke the uses of the settlement, and limit the property to the new born son for life, with remainders over, may be valid as regards sons born in the settlor's lifetime (*l*). It is submitted that such a contention cannot be supported.

Where, however, the power is so limited that it is, in fact, two distinct powers, one of such powers may be valid while the other is void for remoteness. In *Attenborough v. Attenborough* (*m*) there was a discretionary power to the testator's brother James, "or other my trustees," to advance money out of the testator's estate to his nephew George or any of George's children. The will contained a power to appoint new trustees. The power was held valid as to James, the testator's brother. Wood, V.-C., considered that it might be treated as two powers, one vested

(*f*) Lewis Perp. 486; and see *Ferrand v. Wilson*, 4 Ha. 344; 9 Jur. O. S. 860.

(*g*) *Ware v. Polhill*, 11 Ves. 257; *Ferrand v. Wilson*, *ubi supra*.

(*h*) *Infra*, p. 315.

(*i*) See *Dungannon v. Smith*, *supra*,

p. 113.

(*k*) Lewis Perp. 486, 7.

(*l*) 2 Prest. Abst. 158; per Lord Cottenham, *Wood v. White*, 4 M. & Cr. 460, 482.

(*m*) 1 K. & J. 296; 25 L. T. O. S. 155.

in James and the other in his successors in the trust; and that whether the power was exercisable by the latter or not, it was clearly good as to James. Chap. XII.

In *Grange v. Tiving* (n) a power for the settlor, or any of the heirs of his body, to revoke the settlement was held valid, and exercisable by a daughter, who was heir of the body of the settlor. The question of remoteness was not raised; and, even if the power could be supported as regards the settlor, it would seem to be clearly too remote as regards "any of the heirs of his body."

There is a numerous class of powers which, although purporting to endure, and being in fact exercisable beyond the line of perpetuity, are nevertheless held to be valid, as being outside the scope of the Rule against Perpetuities and unaffected by it. Powers exempt from the Rule against Perpetuities.

Powers of leasing, sale, and exchange, and other powers usually inserted in settlements of real estate are valid, although their exercise is not in terms restrained within the line of perpetuity (o). And the rule is the same whether the ultimate limitation of the fee is preceded by limitations in tail or not (p). Such powers are exercisable so long as any of the purposes of the settlement remain to be performed. As soon as the fee vests in possession, either by the estate tail being barred or otherwise, the object of the settlement is fulfilled, its purposes are spent, and the power is at an end (q). Powers of sale, exchange, and leasing, in settlements of real estate.

Although it is not necessary to the validity of such powers that they should be in terms restrained within the line of perpetuity, conveyancers, "by a somewhat anomalous practice," usually limit the exercise of powers

(n) *Bridg. by Ban.* 107.

(o) *Lantsbery v. Collier*, 2 K. & J. 709; 25 L. J. Ch. 672; see also *Doncaster v. Doncaster*, 2 Jur. N. S. 1066; 3 K. & J. 26; *Cole v. Sewell*, 4 Dr. & War. 1, 132; *Peters v. East Grinstead Railway Co.*, 16 Ch. D. 703; 18 Ch. D. 429; 44 L. T.

N. S. 372.

(p) *Lantsbery v. Collier*, *ubi supra*. In *Boyce v. Hanning*, 1 L. J. Ex. 123; 2 Cr. & J. 334, there was a limitation for life with remainder in fee.

(q) See *Lantsbery v. Collier*, *ubi supra*.

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of sale (though not powers of leasing) within the legal limit (*r*). The doubt as to the validity of such powers, which originated in a dictum of Lord Eldon in *Ware v. Polhill* (*s*), has been removed and the law finally settled by the cases above cited.

The doctrine of *Lantsbery v. Collier* does not apply where the intention is clear that the power is to be exercised when the ultimate limitation has taken effect, or where there is nothing but a limitation of the fee in the first instance (*t*). In such cases, if it is clear from the nature of the instrument and the purpose for which the power is created, that it is exercisable only within a reasonable period, it is not necessary to its validity that its duration should in terms be restricted within the perpetuity limit. Thus a power given to trustees to sell for the purpose of dividing the proceeds amongst the testator's children, not in terms restricted as to the time during which it is exercisable, is valid, because it is exercisable only within a reasonable time after the testator's death; and "no one would say that twenty-one years was a reasonable time" (*u*).

In *Taite v. Swinstead* (*x*) the exercise of a power of sale of this character twenty-eight years after the testator's death was held to be valid. In that case the proceeds of sale were settled, and the sale was supported, apparently, upon the ground that the trusts of the proceeds of sale were still subsisting. An estate was devised upon trust for five persons equally. Three of the shares were given absolutely, the other two upon trust for the takers for life, with remainder to their children. Power to sell "as soon as conveniently might be after (the

(*r*) See 3 Davids. Convey. 3rd ed. pp. 483, 570.

(*s*) 11 Ves. 257.

(*t*) *In re Cotton's Trustees and The School Board for London*, 19 Ch. D. 624; *Peters v. Lewes and East Grinstead Railway Co.*, 16 Ch. D. 703;

18 Ch. D. 429; 44 L. T. N. S. 372.

(*u*) Per Jessel, M. R., *Peters v. Lewes, &c., Railway Co.*, 18 Ch. D. p. 434.

(*x*) 26 Beav. 525; 33 L. T. O. S. 312.

testator's) decease" was given to trustees. A sale twenty-eight years after the testator's death, and during the life of one of the tenants for life, was held valid. Lord St. Leonards (y) doubts whether a sale twenty-eight years after the testator's death was within the terms of the power.

A power of sale and exchange in a strict settlement of real estate, in terms unlimited as to duration, being valid in its creation, is valid so long as any of the purposes of the settlement remain to be performed, and may be exercised at any time within that period, though beyond the line of perpetuity (z).

It follows from *Lantsbery v. Collier*, and the other cases establishing the validity of indefinite powers of sale and exchange in a strict settlement, that no power, strictly so called, which is collateral to, and liable to destruction by the owner of, an estate tail can be void for remoteness. But powers of this character must be distinguished from trusts which are annexed to the fee, or to an estate limited to the trustees in priority to the estate tail, and which are therefore indestructible, or destructible only as regards their future operation, by the tenant in tail. Such trusts are sometimes declared in terms which purport to confer a power on the trustees, and are sometimes treated by the Court as powers (a). But as regards remoteness they are trusts and not powers, and are subject to the rules which govern trusts. These cases, therefore, though generally cited upon the question of the validity of powers connected with estates tail, cannot be relied on as authorities exactly in point. Powers, properly so called, which are collateral to an estate tail are rather analogous to

Powers collateral to an estate tail.

(y) Sugd. Pow. 8th ed. 860, note.
(z) *Lantsbery v. Collier*, 2 K. & J. 709; 25 L. J. Ch. 672; *Doncaster v. Doncaster*, 3 K. & J. 26; 2 Jur. N. S. 1066; and see Sugden on Powers, 8th ed., 850, 851.

(a) See per Lord Cranworth, and

Knight Bruce, L.J., *Briggs v. Earl of Oxford*, 1 D. M. & G. 363; 21 L. J. Ch. 829; and per Romilly, M.R., *Floyer v. Bankes*, L. R. 8 Eq. 115, 118; 3 D. J. & S. 306; and see *Meller v. Stanley*, 2 D. J. & S. 183; 12 W. R. 524, 780.

Chap. XII. shifting uses limited in a similar manner; and the cases establishing the validity of the name and arms clause, and similar shifting clauses, in a strict settlement are applicable to powers. These cases are fully considered in another chapter (b).

*Ferrand v.
Wilson.*

Ferrand v. Wilson (c) is a case of some difficulty. The testator there devised real estate to the use of his executors, for a term of twenty-one years from his death, without impeachment for waste, upon the trusts after declared; and subject thereto he devised the lands to the use of A. for life, remainder to the use of B. for life, remainder to the use of the sons of B. successively in tail; with remainders over for life and in tail; and with an ultimate remainder to the testator's right heirs in fee. The trusts of the term of twenty-one years were, to receive the rents, cut timber, and therewith pay debts and legacies, and, subject thereto, for the person entitled to the reversion expectant upon the term. And there followed a proviso that it should be lawful for the executors, during the term, or after its expiration, until some person entitled in possession under the limitations of the will to an estate tail or some greater estate should be of the age of twenty-one years, to enter and cut timber and apply the proceeds in payment of debts and legacies, and the surplus in the purchase of lands to be settled to the uses of the will. It was held by Wigram, V.-C., that the power arising to the executors under the last proviso, apart from the trusts of the term to cut timber, was void for remoteness. Whether the power was to be treated as an imperative power enforceable as a trust by the Court, or as a discretionary power, interfering so far as it went with the right of the tenant in tail, and whether the timber was to be considered as rents and profits or as parcel of the inheritance, the conclusion was the same—that it was altogether void for remoteness. The only doubt expressed by Wigram, V.-C.,

(b) *Supra*, p. 140.

(c) 4 Ha. 344; 9 Jur. O. S. 860.

was, whether or no the power was apportionable, so as to be valid within the line of perpetuity, and void only so far as it purports to be exercisable beyond that line. As to this point, he considered that he was bound by *Ware v. Polhill* to hold that it was void altogether; though his own opinion was that it should be supported in part.

Upon this case the following observations arise. If the clause authorising the executors to cut timber was a mere power, it is difficult to reconcile *Ferrand v. Wilson* with *Lantsbery v. Collier* and the class of cases establishing the validity of powers of sale in a strict settlement. The distinction drawn by the Vice-Chancellor (*d*), that "powers of sale and exchange, leasing, and the like, do not tend to perpetuities," does not seem tenable. From the judgment it does not clearly appear whether the case was considered by the Court to be one of trust or power. The clause in question (as to cutting timber) was spoken of as a trust (p. 379) and a power (pp. 380, 382) indiscriminately. And the decree declares the invalidity for remoteness, not of the trust or power to cut the timber, but of the trust of the proceeds of the timber. By the judgment the trust or power to cut was held to be void for remoteness.

Ferrand v. Wilson was much considered in a subsequent case, *Briggs v. Earl of Oxford* (*e*), which was clearly the case of a trust. Although not expressly dissented from, *Ferrand v. Wilson* does not appear to have met with the approval of the Court (Cranworth, C., and Knight Bruce, L.J.). It was distinguished, not upon the ground that it was the case of a power, but upon the ground, apparently, that the trusts of the proceeds of the timber were different in the two cases.

It is submitted that *Ferrand v. Wilson* can be supported only upon the ground that the clause in question

(*d*) P. 381.

(*e*) 1 D. M. & G. 363; 21 L. J.

Ch. 829; *supra*, p. 158.

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created, not a power collateral to the estates tail, but a trust annexed to the fee, and indestructible by the tenants in tail.

In *Lade v. Holford* (*f*) there was in a strict settlement a proviso that A., B., C., and their heirs, to whom no estate was expressly limited for the purpose, should, so often as any tenant in tail should be under twenty-six, enter, receive, and accumulate the rents, and invest them in the purchase of lands to be settled to the uses of the will. It was held that the proviso was void for repugnancy. The true ground of its invalidity seems to have been remoteness (*g*). It created a trust to accumulate for twenty-six years, which was antecedent to the estate tail, and, not being protected by the estate tail, was void for remoteness (*h*). The case is cited by Lord St. Leonards as an authority for the proposition that a power to raise a use, which would be too remote, if contained in the instrument creating the power, is itself invalid (*i*).

A power affecting real estate in an event which will not, or may not, happen until after the determination of an estate tail in the lands, is not protected by the estate tail, and is void for remoteness.

In *Bristow v. Boothby* (*k*) real estate was limited by a marriage settlement to the sons of the marriage successively in tail male, remainder to daughters in tail, remainder to the survivor of the husband and wife in fee; and power was given to the wife, if the husband survived her, and all the children of the marriage died without issue, to raise a sum of money out of the estates. The power was held to be void for remoteness. For if the

(*f*) 3 Burr. 1416; 1 W. Bl. 428; Ambl. 479; F. C. R. 530, Butler's note.

(*g*) See F. C. R. 530, Butler's note.

(*h*) See 3 Dav. Preced. 3rd ed. 467, note.

(*i*) Sugd. Pow., 8th ed., 31.

(*k*) 2 S. & S. 465; affd. on app.

See *Ellicomb v. Gompertz*, 3 M. & Cr. 151. *Quære* whether the power was not intended to arise upon failure of the issue in tail; see observations of Wigram, V. C., on this case in *Eno v. Eno*, 6 Hare, 171, 179. See, *contra*, the observations of Kindersley, V. C., in *Harvey v. Stracey*, *infra*, p. 264.

wife exercised the power, and died in the husband's life, leaving daughters of sons of the marriage then living, the money might not be raiseable for centuries, and meanwhile the charge could not be barred. Chap. XII.

Besides powers of sale and leasing in settlements of real estate, and other powers depending upon or collateral to estates tail, the following powers appears to be outside the scope of the Rule against Perpetuities, and exempt from its operation.

A power of sale for raising money to pay debts is not within the scope of the Rule against Perpetuities (*l*). The validity of such a power, though unrestricted in point of time, appears to have been generally assumed (*m*). Power of sale to pay debts,

A power to executors or others to sell land for the purpose of raising a legacy which vests within the legal period, or for the purpose of distribution amongst objects who are not too remote, is valid, without being in terms restricted as to time. Such a power is in the nature of a trust, the beneficial interest under which vests within the legal period. It would seem also that it is not, in fact, exercisable beyond the line of perpetuity, or indeed beyond a reasonable period from the testator's death (*n*). or legacies.

The power of appointing new trustees of a settlement of real estate, and the express or implied power of revocation and new appointment incident thereto, does not appear to be open to the objection of remoteness. The trusts and powers (other than the power in question) of the settlement being valid, whether they are to be executed by A. or B. is immaterial, so far as the Rule against Perpetuities is concerned (*o*). Power of appointing new trustees.

(*l*) It has been so held of a trust for accumulation for a like object; see *Tewart v. Lawson*, L. R. 18 Eq. 490; 22 W. R. 822.

(*m*) See *Holder v. Preston*, 2 Wils. 400; *Silk v. Prime*, 1 Bro. C. C. 138, note; 1 Jarm. on Wills, 4th ed., 291; *Lewis on Perp.* 558; 1 Chance

on Pow. 117, 118; Third Report of Real Property Commissioners.

(*n*) See per Jessel, M. R., *Peters v. Lewes and East Grinstead Ry. Co.*, 18 Ch. D. 429, 434.

(*o*) "Powers to appoint new trustees have been, indeed, sometimes framed in terms limiting the right

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Power of sale,
distress and
entry, in a
mortgage.

A power of sale in a mortgage is free from objection on the ground of perpetuity, and may be exercised at any time. Rightly considered such a power is a mere incident of the mortgage security, and not a limitation fettering the ownership of or power of alienating the property subject to the mortgage. Moreover it is liable to be put an end to at any moment by the owner of the equity of redemption (*p*). Powers in a mortgage of distress, of entry, and of leasing, for the same purpose of securing the mortgage debt, are on the same footing. And similar powers in a mortgage exercisable upon condition—for example, that upon sale by the mortgagee a rent charge should arise to the mortgagor—would, it seems, be valid (*q*).

Power of dis-
tress and entry
to secure a
rent charge.

Powers of distress and entry to secure payment of a rent charge are, it seems, exempt from the Rule against Perpetuities. The ground of their exemption probably is, that such powers are incidental to the ownership of the rent and do not tend to make the land inalienable. The same principle applies to a power of re-entry to secure performance of covenants in a lease. There is, however, no case expressly establishing the validity of these powers. In connection with this subject two cases may be noticed.

In *Roe d. Hunter v. Galliers* (*r*) Buller, J., suggested that a proviso in a lease for a long term of years for re-entry upon the lessee his executors or administrators assigning or becoming bankrupt “would be open to the objection of creating a perpetuity.” *Sed quære*.

In *Daniel v. Stepney* (*s*), upon a lease of mines for forty years, a power of distress for rent, exercisable over lands not comprised in the lease, was granted or reserved to

of nomination to the period of lives in being and twenty-one years,” 2 Chance on Powers, 409.

(*p*) See Sugden on Powers, 8th ed. 16; *Gilbertson v. Richards*, 4 H. & N. 277; 5 H. & N. 453; 28 L. J. Ex. 158; 29 L. J. Ex. 213; Lewis on Perp. 561.

(*q*) See Sugd. on Pow. 8th ed. 16; *Gilbertson v. Richards*, *ubi supra*; and per Kay, J., 20 Ch. D. 572.

(*r*) 2 T. R. 133, 140.

(*s*) L. R. 7 Ex. 327; *ib.* 9 Ex. 185; 41 L. J. Ex. 208.

the reversioner. The power was held valid, and exercise-able by the lessor against an assignee of the lands subject to the power, who took them with notice of the lease. This case appears to have been decided upon an erroneous application by the Exchequer Chamber of the doctrine of *Tulk v. Moxhay* (t).

Under a power that is void for remoteness its objects can take no interest. An exercise of it will not raise a case of election by which the appointees can benefit. In *Wollaston v. King* (u) a testatrix, having under the settlement executed before her marriage power to appoint a fund in favour of children of the marriage, by her will in execution of the power appointed part of the fund to her son for life, with remainder to such persons as he should by will appoint. There was a general residuary appointment of the settled fund, subject to the appointment to the son and other appointments, to the daughters of the marriage. Under the will the daughters also took benefits out of property belonging to the testatrix. The power to the son to appoint by will was held void for remoteness, and the daughters took under the residuary appointment the settled property appointed to the son. The son having by his will purported to execute the power, his appointees sought to put the daughters to their election between the settled property appointed to them by the son and the property of the testatrix given to them by her will. It was held by James, V.-C., that the doctrine of election did not apply, since the daughters were not claiming anything adversely to the will, within the meaning of the rule as to election. He added: "It is also material that the reason why the gift fails is that there was an attempt to create a power in violation of the rules of law. I apprehend that it is not for this Court to aid such an attempt, either by the application of the doctrine of election, or otherwise."

Execution of a power which is void for remoteness does not raise a case of election.

(t) 2 Ph. 774; 18 L. J. Ch. 83.
See *supra*, pp. 18, 60.

(u) L. R. 8 Eq. 165; 38 L. J. Ch. 61, 392.

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It appears, therefore, that if the daughters had taken the settled property under the settlement in default of appointment by the testatrix, and not under her will, the result would have been the same—namely, that the son's appointees could not have raised a case of election.

Interests which may, in point of remoteness be created under a power of appointment ; (1) where the power is general.

There is an important distinction as to limitations which may, in point of remoteness, be created under powers of appointment, according as the power is general or particular. The donee of a general power of appointment has, as regards the operation of the Rule against Perpetuities, the same capacity of disposition as an absolute owner (*x*). He may limit, under his power, any estate or interest which an absolute owner may limit. It is immaterial whether the limitation in the instrument creating the power, in default of appointment, is to the donee of the power, or not (*y*). Thus A., the donee of a general power, may appoint to such persons as B. shall appoint (*z*).

A general power of appointment exercisable by will only must, on the question whether an appointment under it is too remote, be treated on the same footing as a special power (*a*).

(2) Where the power is particular.

The donee of a particular or special power has not the same latitude with regard to remoteness as where the power is general. No appointment under a particular power is valid unless it would have been free from objection, in point of remoteness, if it had been an original limitation contained in the instrument creating the power. Thus if A., being childless at the creation of the power, in exercise of a power of appointment amongst children, appoints to her son, B., for life with remainder to her son, C., in fee, the appointment to C. is void for remoteness (*b*).

(*x*) Sugd. on Pow. 8th ed. 395, 396.

(*y*) *Ibid.*

(*z*) Sugd. on Pow. 8th ed. 195, 196, 396.

(*a*) *In re Powell*, 39 L. J. Ch. 188.

(*b*) *Harvey v. Stracey*, 1 Drew. 73, 134 ; 22 L. J. Ch. 23 ; Sugden on Powers, 8th ed. 31, 396 ; Lewis

It follows from the rule above stated that an appointment in exercise of a power created by will may be good, while a similar appointment under a power created by deed would be too remote. Since a will comes into operation at the death of the testator, for the purpose of the perpetuity rule time runs, in the case of a power created by will, from the testator's death; whereas, in the case of a power created by deed, it runs from the execution of the deed. Thus, under a power created by will of appointment amongst the issue of a bachelor, a life interest may be appointed to a child born in the testator's life, after the date of the will, with remainder to the child's children (c). If the power had been created by deed, such an appointment would have been void for remoteness.

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Distinction according as the power is created by deed or by will.

In *Peard v. Kekewich* (*ubi supra*) the devise was in trust for A. for life, with remainder to any of his children as he should appoint. At the date of the will A. had no child; at the death of the testator he had a son, B., three years old. A. by will appointed to trustees and their heirs in trust for B., his heirs, executors, administrators, and assigns, and to be conveyed to him at twenty-three; with a gift over to other sons if B. died under twenty-one. And the testator directed the rents to be accumulated until B., or such other sons, should attain twenty-three, and then to be paid over. It was held by Romilly, M.R., that the appointment to B. was valid, and also the direction to accumulate until B. attained twenty-three. The appointment, it was held, vested at the appointor's death, and not when B. attained twenty-three; no question of remoteness therefore could arise as to that. The direction to accumulate was valid, because, as regards B., it would have been valid, if contained in the will of the donor of the power.

on *Perp.* 484, 488; *D'Abbadie v. Bizoin*, 5 Ir. Re p. Eq. 205; *In re Brown and Sibley's Contract*, 3 Ch. D. 156.

(c) See *Peard v. Kekewich*, 15 Beav. 166; 21 L. J. Ch. 456; *Williams v. Teale*, 6 Hare, 239.

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Appointment to a person unborn at the creation of the power for life, with power to dispose of the corpus (1) by deed or will ; (2) by will only.

An appointment to a person unborn at the date of the creation of the power, for life, with power to the appointee to dispose of the capital by deed or will, is good (*d*). The case would, it seems, be the same where no instrument is specified for the execution of the power ; such a power being exercisable by deed or will (*e*). But an appointment to A. for life, with power to dispose of the corpus by will only, is void for remoteness, unless A. was in existence at the date of the creation of the power (*f*).

A testatrix, having under her ante-nuptial marriage settlement power to appoint a fund in favour of children of the marriage, by her will in execution of the power appointed a part of the fund to her son for life, with remainder to such persons as he should by will appoint. It was held that the appointment in favour of the son's appointees by will was void for remoteness (*g*). In *Morgan v. Gronow* (*h*) Selborne, C., with reference to a similar appointment said : " It is the same thing as if it had been a gift to her (the appointee under the will) for her own benefit, dependent upon a condition that could only be ascertained at the moment of her death, which would clearly be beyond the permitted length of time. If there had been a gift in the deed to her when she attained the age of twenty-five, to vest then and not earlier, it would have been too remote ; *a fortiori* such a gift as this, depending upon the exercise of the power, must be too remote also " (*i*).

(*d*) *Bray v. Bree*, 2 Cl. & F. 453 ; 8 Bli. N. S. 568.

(*e*) *Tomlinson v. Dighton*, 1 P. W. 149 ; *Ex parte Williams*, 1 Jac. & Walk. 89 ; *In re Jackson's Will*, 13 Ch. D. 189 ; 49 L. J. Ch. 82.

(*f*) *Slark v. Dakyns*, L. R. 10 Ch. 35 ; 44 L. J. Ch. 205 ; following *Phipson v. Turner*, 9 Sim. 227 ; 2 Jur. O. S. 414 ; *Morse v. Martin*, 34 Beav. 500 ; *Wollaston v. King*, L. R. 8 Eq. 165 ; 38 L. J. Ch. 61, 392 ; *Morgan v. Gronow*, 42 L. J. Ch. 410 ; L. R. 16 Eq. 1, 9 ; *Webb v. Sadler*, L. R. 14 Eq. 533 ; *ib.* 8

Ch. 419 ; 42 L. J. Ch. 103, 498.

(*g*) *Wollaston v. King*, *ubi supra*.

(*h*) L. R. 16 Eq. 1 ; 42 L. J. Ch. 410.

(*i*) In *Davidson's Settlements*, 3rd ed., vol. 3, p. 156, note (y), it is stated that, previously to the decision in *Wollaston v. King*, it was the opinion of the profession that an appointment such as that in the text was not too remote ; on the ground that the power to the appointee to appoint by his will was part of the interest limited to him as an object of the special power.

In *Webb v. Sadler* (*k*) the attempt was made by a parent, exercising the usual power of appointment in favour of issue in a marriage settlement, to give his son a power of appointment by deed exercisable with the consent of him, the parent, or of the trustees for the time being of his will. A power of appointment by will was given to the son, and in default of appointment by him the fund was given to the son for life, or until bankruptcy or alienation, and after his death to his executors and administrators, but if his interest had previously determined, upon other trusts. It was held that the appointment, so far as it purported to give the son a power of appointment exercisable only with consent, was void—whether on the ground of perpetuity, or as not being authorised by the power, does not appear.

An appointment under the ordinary power in an antenuptial marriage settlement to a child of the marriage, who is unmarried at the date of the appointment, with a direction to the trustees of the fund to hold it upon such trust, to take effect after the marriage of the child, as the child by deed executed before or after the marriage should appoint, was held to be void for remoteness (*l*)—"because marriage, in the case of an unmarried and unborn child, is an event as uncertain, with regard to the time at which it may take place, if it ever does take place, as death is" (*m*).

In *Morgan v. Gronow* (*ubi supra*) an appointment to take effect upon a remote event, and which was therefore void, was made good by a subsequent appointment, executed after the event had happened, and purporting to be a confirmation of the previous invalid appointment. The alteration in circumstances which had occurred since the previous appointment, and which made the second ap-

(*k*) L. R. 14 Eq. 533; *ib.* 8 Ch. Eq. 1; 42 L. J. Ch. 410.
 419; 42 L. J. Ch. 103; *ib.* 498. (*m*) Per Selborne, C., L. R. 16
 (*l*) *Morgan v. Gronow*, L. R. 16 Eq. p. 10.

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pointment valid, was not referred to in the instrument of confirmation, which was held to operate as a new appointment.

Appointment to a class including possibly remote objects.

Where the power, but not the appointment, includes only valid objects.

An appointment to a class of persons, some of whom cannot take as being beyond the line of perpetuity, is altogether void (*n*).

But if the power is expressly made exercisable only in favour of such of the members of a class as are not too remote, it seems that an appointment to the class generally might be held good, as being, in effect, to those only of the class who are objects of the power (*o*). So where the power was expressly limited to take effect only within the legal period (twenty-one years after the death of the donee), an appointment to A., with a proviso that if A., his executors or administrators, should not comply with a request to be made by the appointor, her executors or administrators, the property should go over to other objects of the power, it was held that the limitation over was not too remote (*p*). "I apprehend," said Wood, V.-C., "that the proper construction of the clause, giving to the executor the right of determining when the application was to be made, would be, to construe it as if contained in the instrument creating the power, and it would thus be limited to take effect within a period of twenty-one years after the death of the donee; and then the condition becomes a limitation of the fund upon a request being made within a time confined to the legal period" (*q*).

Where the objects of a power are all within the line of perpetuity, but the operation of the power is not expressly confined within that period, an appointment to an object

(*n*) Sugden on Pow. 8th ed. 505; *Jee v. Audley*, 1 Cox, 324; 2 Ves. 365; *Routledge v. Dorril*, 2 Ves. 357. And see p. 85, *supra*, as to the invalidity of a limitation to a class, some of the members of which are not ascertainable within the legal period.

(*o*) See Lewis on Perp. 498.

(*p*) *Stroud v. Norman*, 1 Kay, 313; 23 L. J. Ch. 443. And see Sugden on Powers, 8th ed. 527, note: "It should seem that no question upon a perpetuity could arise in this case." And see *supra*, pp. 24, 25.

(*q*) Kay, p. 329.

so framed that it will not necessarily vest within the legal period, reckoning from the creation of the power, is void for remoteness. In *Re Brown and Sibley's Contract* (r) real estate was limited by an ante-nuptial marriage settlement to the husband, the settlor, for life, with remainder to his children or issue born before the execution of the appointment as he should by deed or will appoint. An appointment to a son, A., in fee, with a proviso that, if A. should have no child who attained twenty-one, the property should go over to a grandson, B., in fee, was held void for remoteness (s).

Where an appointment creates interests, some of which are too remote and others not, the appointment fails altogether, unless the interests which are not too remote are ascertainable, as to their amount, within the legal period, and are capable of being separated from those which are too remote. Thus under a power in a marriage settlement to appoint amongst issue, it is held that an appointment to issue, generally, is void, even as to issue born within the line of perpetuity (t).

Appointment of interests, of which some are too remote and others not, those which are too remote being separable from those which are valid.

But it seems that if the amount or interest appointed to a particular object can be ascertained within the legal period, the appointment would be good as to that object (u). The application of the Rule against Perpetuities is the same in this respect, where the limitation is by way of appointment, as in other cases (x). Thus in *Griffith v. Pownall* (y) A. had power to appoint a fund amongst all the children, begotten and to be begotten, of B., and their issue; and in default of appointment the fund was limited to the children of B. equally. B. had six children, all of whom were living when the power was created. A. by his will directed that the share to which every child of B. was entitled, in default of appointment, should be held in trust

(r) 3 Ch. D. 156.

(s) Cf. *D'Abbadie v. Bizoin*, 5 Ir. Rep. Eq. 205.

(t) *Routledge v. Dorril*, 2 Ves.

357.

(u) Sugden on Pow. 8th ed. 508.

(x) See *supra*, pp. 79, *seq.*

(y) 13 Sim. 393.

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for such child for life, and after its death upon trust for the children of such child. Sir L. Shadwell held that the appointment to the grandchildren was not too remote.

In *Wilkinson v. Duncan* (z) there was a bequest by an uncle in trust for his nephew for life, with power for the nephew to appoint amongst his children. The nephew in exercise of the power directed trustees to pay £2000 to each of his daughters as and when she should attain twenty-four; and to pay the residue "between his sons equally as and when they should respectively attain twenty-four;" and, in the event of no son attaining twenty-four, to divide the residue amongst the daughters at twenty-four. It was held that the appointment to such of the daughters as were three years old at the appointor's death was good; but that, as to the other daughters and all the sons, it was void for remoteness.

Absolute appointment followed by invalid condition or modifying clause.

A clear appointment to an object of the power of the absolute interest, accompanied by a condition or trust which infringes the Rule against Perpetuities, operates as an absolute appointment; the condition or trust being rejected as invalid (a). Thus where, under the usual power of appointment in a marriage settlement, the trust fund was appointed to a daughter of the marriage for her separate use for life without power of anticipation, with remainder to her appointees by deed or will, and in default of appointment to her executors and administrators, it was held that the appointment for life was good, and that the restraint upon anticipation being too remote, must be rejected (b).

(z) 30 Beav. 111; 26 L. J. Ch. 495.

(a) See *Watt v. Creyke*, 3 Sm. & Giff. 362. As to the general rule where there is an absolute gift, followed by a qualifying trust or restriction which is wholly or in part invalid, see *Churchill v. Churchill*, L. R. 5 Eq. 44; 37 L. J. Ch. 92.

(b) *Fry v. Copper*, Kay, 163;

Thornton v. Bright, 2 M. & Cr. 230; 6 L. J. Ch. 121; *In re Cunynghame's Settlement*, L. R. 11 Eq. 324; 40 L. J. Ch. 247; *In re Teague's Settlement*, L. R. 10 Eq. 564; 22 L. T. N. S. 742; *In re Michael's Trusts*, 46 L. J. Ch. 651; *Cooper v. Laroche*, 17 Ch. D. 368; 29 W. R. 438. *In Carver v. Bowles*, 2 R. & M. 301, the restraint upon antici-

So again in *Stephens v. Gadsden* (c) an appointment was made in trust for objects of the power, "subject to" certain trusts declared concerning other property, some of which were void for remoteness. It was held that the appointees took the fund absolutely, and that the trusts referred to might be struck out of the will as invalid. In another case, under a power to appoint to children, an appointment was made to sons and daughters with a declaration that the shares of daughters should be held upon trust for them for their separate use for life without power of anticipation, with remainder to their children as they should appoint, and in default of appointment for the children equally, and in default of children for the next of kin of the daughters. It was held that the trusts for the children of daughters, who were not objects of the power, and for the next of kin, who were too remote, were inoperative, and that the previous appointment to the daughters took effect unqualified by the subsequent limitations, except as to the restraint upon anticipation (d).

So in *Kampf v. Jones* (e) a testatrix, under a power of appointment amongst children or issue, appointed to her children, and directed that the share of a daughter should be held in trust for the daughter for life, with remainder to her issue. It was held that the trust for issue, which was too remote, might be rejected, and that the daughter took absolutely.

The principle of these cases does not apply unless there is a clear limitation, in the first instance, of the absolute interest. Thus a direction to trustees to invest a fund for

pation was, in the absence of argument, held to be good. *Fry v. Capper* was reluctantly followed by Jessel, M.R., in *In re Ridley*, 11 Ch. D. 645; *nom. Buckton v. May*, 48 L. J. Ch. 563; but it is approved in Sugd. on Powers, 8th ed. 502—"the restriction seems to be a violation of the Rule against Perpetuities."

(c) 20 Beav. 463.

(d) *Carver v. Bowles*, 2 R. and M. 301; see the last note as to the restraint upon anticipation.

(e) 2 Keen, 756; 7 L. J. Ch. 63; see also *Harvey v. Stracey*, 1 Drew. 73; 22 L. J. Ch. 23; *Gerrard v. Butler*, 20 Beav. 541; *Courtier v. Oram*, 21 Beav. 91.

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the benefit of A., followed by a direction to pay the income to A. for life, and after his death to hold the fund upon trusts which are void for remoteness, does not operate as a gift of the fund to A (*f*).

Appointment of partial interest with remainder void for remoteness.

If a partial interest in real or personal estate is well appointed to A., with remainder, void for remoteness, to B., the appointment of the partial interest to A. takes effect, and the remainder to B. fails (*g*). But where the appointment is of real estate, and by will, to A. for life, with remainder to his issue, who are too remote, A. may take an estate tail under the *cy près* doctrine (*h*).

Appointment by way of remainder expectant upon a prior interest that is too remote.

A limitation by way of appointment, following another limitation which is void for remoteness, fails to take effect. And this is so although the persons intended to take under the void limitation have actually failed, or never come into existence (*i*). In *Robinson v. Hardcastle* (*ubi supra*) there was an appointment, in exercise of a power to appoint to children, created by an ante-nuptial marriage settlement, to a son for life with remainder to his children; and, in default of children of the son, to a daughter of the marriage. It was held that the daughter could not take, though the son died childless (*k*).

But a valid appointment to objects of the power will not fail by reason of a power to create prior interests which the donee of the original power had no authority to create, or which is void for remoteness (*l*).

Appointment by will of residue carries

Where an appointment of real estate by will under a general or special power fails for remoteness, and there is

(*f*) *Whitehead v. Bennett*, 22 L. J. Ch. 1020.

(*g*) Sugden on Pow. 8th ed., 503; *Routledge v. Dorrit*, 2 Ves. 357; *Wollaston v. King*, L. R. 8 Eq. 165; 38 L. J. Ch. 61, 392; *D'Abbadie v. Bizin*, 5 Ir. Rep. Eq. 205.

(*h*) See Sugden on Pow. 8th ed., 499. *Pitt v. Jackson*, 2 Bro. C.C., 51; *Stackpoole v. Stackpoole*, 4 Dr. and W. 320; *Robinson v. Hardcastle*,

2 T. R. 241; 781; 2 Bro. C. C. 22, 344.

(*i*) Sug. on Pow. 8th ed. 508.

(*k*) See also *Brudenell v. Elwes*, 1 East, 442; 7 Ves. 382; *Routledge v. Dorrit*, *ubi supra*; *Beard v. Westcott*, 5 Taunt. 393; 5 B. and Ald. 801; *Bailey v. Lloyd*, 5 Russ. 330; *Reid v. Reid*, 25 Beav. 469.

(*l*) See *infra* p. 259.

a residuary devise operating by way of appointment under the power, the property passes under the residuary devise by virtue of 1 Vict. c. 26, s. 25 (*m*). Chap. XII.
property comprised in an appointment which fails for remoteness.

A testator having power under a settlement made in pursuance of an ante-nuptial agreement, to appoint real estate amongst the issue of his marriage with his deceased wife, by will operating as an execution of the power, devised his real estate to his son for life, with remainder to the son's children as the son should by deed or will appoint, and, in default of appointment, to such of the children as should attain twenty-one, or, being daughters, marry. And he "devised all his real and personal estate not thereinbefore disposed of unto the said (son) absolutely." It was held by Jessel, M.R., that the gift to the son's children was void for remoteness, and that the subject of it passed under the residuary devise to the son (*n*).

In *Wollaston v. King* (*o*) the same point occurred with reference to personal property. It seems to have been assumed that the residuary gift passed the property.

So where there is a limitation in default of appointment, and an appointment is made which fails for remoteness, the limitation in default of appointment would, it seems, take effect, as if no attempt at executing the power had been made (*p*).

A limitation in default of appointment under a power that is void for remoteness takes effect as if the power were omitted. So where, as in the *Duke of Marlborough's Case* (*q*), there is a power of revocation void for remoteness in its creation, the limitations which it is intended to override take effect unaffected by the power (*r*). And, Effect of power, void for remoteness, upon limitation subject to it.

(*m*) *Freme v. Clement*, *infra*.

(*n*) *Freme v. Clement*, 18 Ch. D. 499; 44 L. T. N. S. 398.

(*o*) L. R. 3 Eq. 165; 38 L. J. Ch. 61, 392.

(*p*) "A bad appointment is a nullity;" Sugd. Pow. 8th ed. 639; *Webb v. Sadler*, L. R. 14 Eq. 533;

8 Ch. 419; 42 L. J. Ch. 103, 498;

Stark v. Dakyns, L. R. 15 Eq. 307; L. R. 10 Ch. 35; 42 L. J. Ch. 524;

44 L. J. Ch. 205.

(*q*) *Supra*, p. 234.

(*r*) Sugd. on Pow. 8th ed. 451; *Warwick v. Gerrard*, 2 Vern. 7; *Goodtitle v. Pettoe*, Fitzg. 299; *Curr*

Chap XII. generally, a limitation in default of appointment is vested, subject to be divested by an exercise of the power. This is the case whether the power is exclusive, or not (*s*).

In *Carr v. Atkinson* (*t*) lands were devised to trustees in trust for A. for life, and after her death, in trust for such one or more of her children or remoter issue, for such estates, in such shares, charged with such annual or other sums for their or any of their benefit, and with such remainders or limitations over between or amongst them, as A. should by writing under her hand appoint, and in default of appointment, in trust for the children of A. equally as tenants in common. A. survived the testator, and by her will, in exercise of the power, appointed that the trustees of the will of the donor of the power should stand seised of the lands upon trust to convey the same, as to one-fifth part thereof, to trustees upon trust for her daughter, B., for life for her separate use, and after her death upon such trusts for the benefit of any surviving husband of B. for his life, or other shorter period, as B. should, notwithstanding coverture, by her will appoint; and, subject thereto, in trust for such child or children of B. as had then attained, or should thereafter attain, twenty-one, and if more than one equally. It was held that, the power for B. to appoint to the husband, a stranger, being void, the will of B. must be read as if it were struck out, and the appointment to B.'s children took effect unaffected by it. The original testator died in 1842, and B. was married in 1843. It appears, therefore, that B. was born at the creation of the power. The share of C., another daughter, to whom a similar appointment was made, was also in question. It does not appear when she was born. If she were born after the creation of the original power, the power

v. Atkinson, L. R. 14 Eq. 397; 41

L. J. Ch. 785.

(*s*) Sugd. on Pow. 8th ed. 451—

454.

(*t*) L. R. 14 Eq. 397; 41 L. J.

Ch. 785.

for her to appoint by will to a surviving husband would be void for remoteness (*u*). Chap. XIII.

An appointment of real estate expressed to take effect upon a general failure of issue of a stranger (not being tenant in tail of lands subject to the power) would be void for remoteness. But if the power is to arise upon failure of issue in special tail, or in tail male, or tail female, of A., tenant in tail, and the donee of the power appoints upon failure of issue, generally, of A., the appointment will not fail for remoteness, if it is possible to discover the intention to appoint upon failure of the issue in tail. In *Eno v. Eno* (*x*) the appointor, being tenant for life, with remainder to her sons in tail male, with remainders to her daughters in tail, appointed upon failure of her issue. It was held that the appointment took effect upon failure of the issue in tail, and that it was not void for remoteness.

(*u*) See *Morgan v. Gronow*, *supra*, p. 252.

(*x*) 6 Hare, 171; and see *Bristow v. Boothby*, *supra*, p. 246.

CHAPTER XIII.

THE RULE AGAINST PERPETUITIES WITH REFERENCE TO
THE CONSTRUCTION OF INSTRUMENTS—THE CY PRÈS
DOCTRINE.

The Rule
against Per-
petuities is a
rule of law
and not of
construction.

THE Rule against Perpetuities being a rule of law, and not of construction, cannot, as a general rule, affect the construction of an instrument. Like some other rules of law, such, for example, as that which required a contingent remainder to be supported by an estate of freehold, it operates independently of the intention of the settlor or testator, and, in fact, always disappoints the intention by destroying the limitation. So distinct, indeed, is the question of remoteness from that of intention, that even where the intention is clear, if it is capable of being expressed in two ways, one of which satisfies the requirements of the Rule against Perpetuities, and the other does not, the corresponding disposition will fail for remoteness, if it is not expressed in the form of a limitation which does not transgress the Rule (*a*).

It is, nevertheless, the fact that the books abound with cases in which attempts have been made to induce the Courts to construe limitations, which, by ordinary rules of construction, are void for remoteness, in a sense which, but for the remoteness, they would not bear. Nor have these attempts altogether failed. Clear as the general principle

(*a*) See *Miles v. Harford*, 12 Ch. *supra*, pp. 73, *seq.*
D. 691; 41 L. T. N. S. 378; and

is, that the meaning of an instrument must be ascertained before its legal effect can be determined, there is a numerous class of cases in which the tendency of the Courts so to read an instrument *ut res magis valeat quam pereat* has in fact imported the law of remoteness into the question of construction.

The general principle, however, applies at least to this extent: that where there is no ambiguity in the words of a limitation, where, without the aid of any canon of construction, they are clear and can fairly bear one meaning only, they will not, merely in order to give effect to a limitation which would otherwise be void for remoteness, be held to mean something else. On the other hand, where the words of a limitation are obscure and ambiguous, there is no doubt that the construction which will give some effect to the limitation is preferred to that which would make it void for remoteness. And, in some cases, even well-recognised canons of construction have been rejected, where their application would invalidate the limitation.

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And, as a general rule, cannot affect the construction of instruments.

The general rule is thus stated by Wood, V.-C. (b):—"You must first ascertain the objects of the testator's bounty by construing his will without reference to the rules of law against perpetuities; and having, apart from any consideration of the effect of those rules in supporting or destroying the claim, arrived at the true construction of the will, you are to apply the rules of law as to perpetuities to the objects so ascertained." The rule is stated in similar terms in many other cases (c).

It was recognised, and re-stated, by Lord Selborne, C., in a recent case before the House of Lords, with a qualifi-

(b) In *Catlin v. Brown*, 11 Ha. 372; 1 W. R. 533.

(c) See *Dungannon v. Smith*, 12 Cl. & F. 546, 570; 10 Jur. O. S. 721; *Taylor v. Frobisher*, 4 D. J. & S. 191, 197; 21 L. J. Ch. 605;

Speakman v. Speakman, 8 Ha. 180; *Heasman v. Pearce*, L. R. 7 Ch. 275, 283; 41 L. J. Ch. 705; *Cunliffe v. Brackner*, 3 Ch. D. 393, 399; 46 L. J. Ch. 128.

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But it may affect the construction where the words are obscure or ambiguous.

cation where there is ambiguity in the words of the limitation :—" You do not import the law of remoteness into the construction of the instrument by which you investigate the expressed intention of the testator. You take his words, and endeavour to arrive at his meaning, exactly in the same manner as if there had been no such law, and as if the whole intention expressed by the words could lawfully take effect. I do not mean, that in dealing with words that are obscure and ambiguous (*d*), weight, even in a question of remoteness, may not sometimes be given to the consideration that it is better to effectuate than to destroy the intention ; but I do say, that, if the construction of the words is one about which a Court would have no doubt, though there was no law of remoteness, that construction cannot be altered or wrested to something different for the purpose of escaping from the consequences of that law" (*e*).

But expressions which, though ambiguous in themselves, have, by virtue of a canon of construction, acquired a fixed meaning will not, merely *ut res magis valeat quam pereat*, be read in a different sense. " Where the testatrix, in executing a power, has adopted language which, when used in an ordinary case of bequest, has a natural, reasonable, and appropriate meaning, a meaning so invariably applied to it by the Courts, that it has become a canon of construction, it would be most dangerous to wrest that language to a different meaning, for no other reason than that, by so doing, we shall make it better suit, and fit on to, the power. I know of no authority that would justify me in so doing ; on the contrary it has been decided, over and over again, that it cannot be done, even for the

(*d*) " Where there is an ambiguity it is proper to look at the consequences of either construction." per Kay, J., *In re Hudson, Hudson v. Hudson*, 20 Ch. D. 406, 416 ; 51 L. J. Ch. 455 ; though this was said

with reference to a case where no question of remoteness arose.

(*e*) Per Selborne, C., in *Pearks v. Moseley*, 5 Ap. Cas. 714, 719 ; 50 L. J. Ch. 57.

purpose of preventing an appointment being altogether invalid on account of remoteness; and that is a case, surely, in which the argument *ut res magis valeat* would apply much more strongly than to the present case" (f). Chap. XIII.

A striking illustration of the effect of the Rule against Perpetuities in determining the meaning of an ambiguous expression, if not in modifying a canon of construction, occurs in the case of the phrase "die without leaving issue." By a will made before 1838 freeholds and leaseholds were devised to A., but if A. should die without leaving issue, then to B. Notwithstanding the well settled rule of construction, which was applicable to the case, that a gift upon failure of issue of A. takes effect upon a failure of issue at any time, before or after A.'s death, it was held that the gift of the leaseholds, upon the death of A. "without leaving issue," was not void for remoteness, being intended to take effect upon failure of issue at A.'s death and not afterwards; although, as to the freeholds, it was held that the rule of construction as to death without issue meaning failure of issue at any time was applicable, and raised estate tail in A. (g). The only reason for attributing different meanings to the same words, "die without leaving issue," as applicable to different kinds of property, was, that, in the case of the realty, the gift over to B. could, without altering the established meaning of the words, take effect as a remainder after an estate tail in A.; while, in the case of the personalty, the gift over must fail for remoteness, unless the words were construed to mean a failure of issue at A.'s death.

Other cases may probably be cited where, in determining the meaning of ambiguous expressions as to failure of issue, weight has been given to considerations of remoteness

(f) Per Kindersley, V.C., in *Harvey v. Stracey*, 1 Drew. 73, 126; 22 L. J. Ch. 23; Sugd. Pow. 8th ed. 458; *Fry v. Capper*, *infra*, p. 274.

But see the observations on *Bristow v. Boothby*, *supra*, p. 246, note.

(g) *Forth v. Chapman*, 1 P. W. 663.

What rules of construction will give way, *ut res magis valeat quam pereat*.

Forth v. Chapman.

Chap. XIII. *ut res magis valeat quam pereat* (*h*). But it is, nevertheless, well settled that the mere fact that a gift of personalty, to take effect upon a failure of issue of a specified person at any time, before or after his death, is void for remoteness, will not, in a limitation of personalty, restrict the meaning of the words to a failure at death (*i*).

The extent to which rules of construction may be set aside in order to give effect to a limitation which, by ordinary rules, would be void for remoteness, cannot accurately be stated. That some rules of construction are not inflexible, where remoteness is involved, is clear. It may be convenient here to mention some cases in which considerations of remoteness appear to have affected the construction, and to have led the Courts to set aside well recognised rules of construction.

It is a rule of construction that where a testator gives a fund to children as a class, and the share of each child is made payable on attaining a given age, the period of distribution is the time when the first child attains the given age, and all children take who are born before that time (*k*). In two cases (*l*) where the period of distribution according to this rule (the attainment of the given age), was beyond the line of perpetuity, it was held that only children in existence at the testator's death were intended to take. Of these cases it may be said that the rule in *Andrews v. Partington*, being a rule of convenience and not of intention, would perhaps be misapplied where the result of applying it is an intestacy.

In *Mogg v. Mogg* (*m*) a testator devised lands to trustees upon trust to apply the rents and profits in the maintenance of the children, begotten and to be begotten, of his daughter, for their lives; and, after the deaths of such children, he devised the lands to the use of the issue of

(*h*) Cf. *Gee v. Liddell*, L. R. 2 Eq. C. C. 404.
341; 35 L. J. Ch. 640.

(*i*) *Supra*, pp. 186, *seq.*

(*k*) *Andrews v. Partington*, 3 Bro.

(*l*) *Elliott v. Elliott*, 12 Sim. 206;
Kevern v. Williams, 5 Sim. 171.

(*m*) 1 Mer. 654

such children and their heirs as tenants in common. It was held that all the children of the daughter (of whom four were born before, and five after, the testator's death) took equitable interests for their lives, and that, upon the determination of the estate devised to the trustees during the lives of the nine children, the lands passed to the issue (held to mean children) of the four children who were born in the testator's life, as tenants in common in fee. It does not appear from the report of the case why the class of issue was thus limited. It was noticed in argument that, if "issue" included issue of those children who were born after the testator's death, the gift would be void for remoteness; and it would seem that this consideration induced the Court to limit the class.

Leach v. Leach (*n*) is a very similar case. There the gift was of personalty upon trust, after the deaths of the testator's wife, brother, and sister, to pay the income to the eldest daughter, and the other children of his brother, equally for their lives; the principal to be divided amongst all the issue of the daughter and of the other children of the brother. It was held that the daughter, and two other children of the brother, who were born in the testator's life, took the principal.

In *Gosling v. Gosling* (*o*) an absolute devise of real estate by the will was followed by a direction in a codicil that the devisee should not have possession until he attained twenty-five. It was held that the lands vested under the will, and that the codicil had not the effect of deferring vesting until twenty-five; and the Court (Wood, V.-C.) added that it was a "further objection" to the construction which would defer vesting, that it would have the effect of rendering the limitations of the will void for remoteness.

In *Christie v. Gosling* (*p*) the consideration that a Inclination of

(*n*) 2 Y. & C. C. C. 495.

(*p*) L. R. 1 H. L. 279; 32 Beav.

(*o*) Johns. 265; 5 Jur. N. S. 910.

58; 1 D. J. & S. 1; 35 L. Ch. 667.

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the Courts to construe dispositions of heir-looms, and other property, by reference, so that they shall not fail for remoteness.

disposition of personalty by reference to limitations in the same will of settled real estate, would, if applicable to tenants in tail by descent as well as tenants in tail by purchase, be too remote, appears to have influenced the majority of the House of Lords (q) in restricting the *prima facie* meaning of the words to tenants in tail by purchase. And amongst the cases of this class, where property is limited by reference, will be found more than one in which the Courts have shown an inclination to construe a direction that the property shall be enjoyed by successive owners of other settled property in a restricted sense, in order that the entire disposition may not be void for remoteness (r).

It will be seen in a subsequent chapter (s) that the Court will, in some cases, reject words in a will, the effect of which would be to make a limitation void for remoteness, where such words purport to modify, in a manner not allowed by the Rule against Perpetuities, a previous absolute and valid limitation.

Effect of the Rule against Perpetuities upon the construction of executory trusts; the *cy près* doctrine.

The strict rule of construction, as laid down in *Cattlin v. Brown*, *supra*, p. 263, has never been applied to executory limitations. Where a testator, disposing of real estate, directs a conveyance to be executed containing specific limitations, which, if followed literally, would be void for remoteness, the Court will mould the trust so that the testator's intentions may be carried out as far as the law will permit.

Humberston v. Humberston.

Thus, in *Humberston v. Humberston* (t), there was a devise to trustees in trust to convey to A. for life, and after his death to his first son for life, and so to the first son of that first son for life, with remainders, in default of issue male of the first son of A. to the second and other sons of A. and their sons, for life, in like manner. It was held that the trust would be executed by a conveyance to

(q) Lords Chelmsford and Cranworth dissentiente Lord St. Leonards.

(r) See *supra*, pp. 124, *seq.*

(s) *Infra*, p. 278.
(t) 1 P. W. 331; Prec. Chanc. 455, nom. *Humerston v. Humerston*.

the sons of A. living at the testator's death, successively, for life, with remainders to their issue, with remainders to the unborn sons of A. in tail.

The rule in *Humberston v. Humberston*, by which the terms of an executory trust are capable of modification, so far as they infringe the Rule against Perpetuities, is called the *cy près* doctrine. It is thus stated and explained by Rolfe, B., in *Monypenny v. Dering* (u): "The doctrine of *cy près*, in reference to questions of perpetuity, arises where a testator gives real estate to an unborn person for life, with remainder to the first and other sons of such person in tail male, or with remainder to the first and other sons of such person in tail general, with remainder to the daughters as tenants in common in tail, with cross remainders amongst them. In such a case the course of succession designated by the testator is one allowed by the law; but the direction that the first taker should take for life only, with remainder to his children as purchasers, is illegal, as tending to a perpetuity Such a devise has, therefore, been held to give an estate in tail male, or general, as the case may be, to the first taker. By these means the estate, if left, as it were, to itself, will go in the precise course marked out by the testator; though it will be (contrary to what he intended) liable to be divested from that course by the act of the first taker."

Lord St. Leonards in his work on Powers (x), thus states the principle of the rule: "It is a rule of law that where a testator has two objects, one particular and the other general, and the particular intent cannot be effected unless at the expense of the general one, the latter shall be carried into effect at the expense of the former. This is the case where a man gives an estate for life, with remainder to his issue; but the estate is so given that all

(u) 16 M. & W. 418, 428; 17 L. J. Ex. 81. (x) 8th ed. p. 498.

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The *cy près*
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pointments.

the issue cannot take, unless through the parent. The particular intent is, that the parent shall take only for life; the general intent is, that all the issue take; and in these cases the Court will effectuate the general, at the expense of the particular, intent, by giving the parent an estate tail."

The rule of construction adopted in *Humberston v. Humberston*, or *cy près* doctrine, applies to appointments by will in exercise of a power. In *Robinson v. Hardcastle* (y), under a power in a marriage settlement to appoint to children, the husband appointed to a son for life, with remainder to trustees to preserve, &c., with remainder to the first and other sons of the son in tail, with remainders over. It was held that the son took an estate tail (z).

And its application is not confined to cases where the limitation is strictly executory, that is to say, where a conveyance or settlement is directed to be executed; it applies also where the testator declares his intention in general terms and leaves the trustees to carry it out in the best way they may. Thus, in a recent case (a), a testator bequeathed leaseholds upon such trusts as, regard being had to the difference in tenure, would best or most nearly correspond with the uses declared of real estate devised by the will. The uses of the realty included a shifting clause, which, if applied literally to the leaseholds, would have been void for remoteness. It was held that the operation of the shifting clause was restricted; that the intention to confine its operation within the line of perpetuity was sufficiently expressed by the words declaring, in general terms, the trusts of the leaseholds.

But a limitation of heirlooms, or other personal estate, upon trust to follow settled real estate into the hands of successive tenants for life, and tenants in tail of the realty,

(y) 2 T. R. 241, 781; 2 Bro. C. Ch. 107.
C. 22, 344.

(z) Cf. also *Pitt v. Jackson*, 2
Bro. C. C. 51; *Line v. Hill*, 43 L. J.

(a) *Miles v. Harford*, 12 Ch. D.
691; 41 L. T. N. S. 378.

is not executory, merely by reason of a direction that the limitation is to take effect so far as the law, or the rules of law and equity, will permit. Whatever effect these, and similar expressions, may have, it is well settled that they do not give rise to an executory trust (b).

The rule in *Humberston v. Humberston* is a rule of construction, and applies as well to a direct devise as to a limitation by way of executory trust. Thus in *Vanderplank v. King* (c) a testator devised (in effect) to A. for life, with remainder to her children, as tenants in common, for life, with remainder, as to the share of each child, to the children of such child, as tenants in common in tail, with cross remainders amongst them. It was held that the children of A., who were born in the testator's life, took estates for life, with remainder to their children in tail respectively; and that a child of A., who was born after the testator's death, took an estate tail. This case was approved and followed by Romilly, M.R., in *Parfitt v. Humber* (d). In that case the Master of the Rolls described the application of the *cy près* doctrine as follows:—“I think the doctrine of *cy près* established by *Humberston v. Humberston* is not a doctrine to be confined to cases where the testator has made a will of an executory character, and has imposed on the Court or on persons surviving them (*qy.* him) the duty of carrying his general intention into effect, by framing a settlement for that purpose; but that this doctrine is a rule of construction, and that when the Court finds that the object expressed by the testator is to give A. an estate for life, to his eldest son another estate for life, and so on, the Court will carry that intention into effect, as nearly as it can, by giving to A. an estate for life, and to his eldest son, if unborn at the death of the testator, an estate in tail male, or, if he be

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It is a rule on construction, and applies to direct devises as well as to executory trusts.

(b) See further as to this subject, *supra*, p. 128, *seq.*

(c) 3 Ha. 1; 12 L. J. Ch. 497.

(d) L. R. 4 Eq. 443.

Chap. XIII. alive at the death of the testator, an estate for life, with remainder to his eldest son in tail male" (e).

The *cy près* rule has been carried so far as to give the first taker an estate tail, where the intention expressed by the testator was that his children should take as tenants in common in tail. This was the case in *Pitt v. Jackson* (f). Previously to his marriage, a husband covenanted to lay out money in the purchase of lands to be settled to the use of himself and his intended wife, successively, for life, with remainder to the use of the children of the marriage as he should appoint. By his will, in execution of the power, the husband directed part of the money to be laid out in the purchase of lands to be conveyed in trust for a daughter of the marriage, for her life, with remainder to trustees to preserve contingent remainders, with remainder to the children of the daughter, as tenants in common in tail, with remainders over. It was held that the daughter took an estate tail. This case is considered to have carried the *cy près* doctrine to its extreme limits (g). It appears that, according to the ultimate decision in *Pitt v. Jackson*, the point as to the application of the *cy près* rule did not, in fact, arise (h), but the case has since been treated as a binding decision, and was followed by Sir E. Sugden in Ireland (i).

Limits of the application of the *cy près* rule.

The *cy près* doctrine has no application where the intention of the testator is to create a succession of life estates, limited in number. Thus where a testator devised lands to A. for life, with remainders to A.'s eldest or other son for life, with remainder to as many of his descendants, issue male, as should be heirs of his or their bodies, down to the tenth generation, for their lives, it was held that no estate

(c) And see per Jessel, M.R., to the same effect, *Hampton v. Holman*, 5 Ch. D. 183, 190; 46 L. J. Ch 248.

(f) 2 Bro. C. C. 51.

(g) See the observations of Lord

Kenyon in *Brudenell v. Elwes*, 1 East, 442, 451; and of Lord Eldon in *Brudenell v. Elwes*, 7 Ves. 382.

(h) See Sug. Pow. 8th ed. 500.

(i) In *Stackpoole v. Stackpoole*, 4 Dr. & War. 320.

tail was raised in A., or any of his issue; and that all, except the devise to A. for life, was void for remoteness (*k*).

But where the intention is to create a series of life estates, indefinite in number, the rule would, it seems, apply and give the first taker an estate tail (*l*).

Nor does the *cy près* doctrine apply where the intention is to create successive terms of years determinable on death (*m*); or, generally (*n*), where the effect of applying it would be, to carry the property to persons not intended by the testator to take. Where an estate tail is expressly, or by implication, limited to the ancestor, and is followed by limitations of life estates to his children or issue, which life estates are void for remoteness, effect cannot be given to the limitation to the ancestor, while those to his children or issue are rejected (*o*).

It does not apply where the devise is to an unborn person for life, remainder to his children in fee; or, in other cases, where the intention is, that the lands should go in a course which they would not take under a limitation in tail (*p*).

In *Bristow v. Warde* (*q*) lands were settled upon children, as the father should appoint, and, in default of appointment, to the children as tenants in common in tail, with cross remainders amongst them in tail. The father appointed to a son for life, with remainder to the son's children, as the son should appoint. It was held that the *cy près* rule did not apply, and that the son did not take an estate tail.

It does not apply to personal estate (*r*); to a limita-

(*k*) *Seaward v. Willock*, 5 East, 198.

(*l*) See per Rolt, L.J., *Forsbrook v. Forsbrook*, L. R. 3 Ch. 93; 16 W. R. 290.

(*m*) *Beard v. Westcott*, 5 B. & Ald. 801; *Somerville v. Lethbridge*, 6 T. R. 213.

(*n*) See, however, *Nicholl v. Nicholl*,

2 Sir W. Bl. 1159,

(*o*) See per Lord St. Leonards, *Monypenny v. Dering*, 2 D. M. & G. 145, 177, 178; 22 L. J. Ch. 313.

(*p*) *Bristow v. Warde*, 2 Ves. 336; *Hale v. Pew*, 25 Beav. 335.

(*q*) 2 Ves. 336.

(*r*) *Routledge v. Dorril*, 2 Ves. 357.

Chap. XIII. tion by deed (s); or, it seems, to limitation of a mixed fund (t).

In *Fry v. Capper* (u), where an appointment to a married woman for life, with a restraint upon anticipation, was too remote as regards the restraint upon anticipation, it was suggested by the Court that the appointment might be modified under the *cy près* doctrine, so as to take effect according to the power. It seems doubtful whether the *cy près* doctrine could be applied to such a purpose (x). In *Fry v. Capper* the restraint upon anticipation could clearly be rejected, without recourse to that doctrine, and according to a well established rule (y).

In *Lyddon v. Ellison* (z) there was a bequest to the present and future children of a living person followed by a direction to settle the shares of daughters upon them for life for their separate use with remainder to their children. It was held by Romilly, M.R., that the direction to settle was not void for remoteness, but that it was an executory trust, which the Court by the doctrine of *cy près* would carry into effect so far as it could. In this case it does not appear to be necessary to apply the doctrine of *cy près*. The direction to settle was clearly valid as to children born at the testatrix' death, though void for remoteness as to other children (a).

Effect, on construction, of an express reference to the Rule against Perpetuities.

Where the testator expressly refers to the Rule against Perpetuities, for the purpose of confining within legal limits the operation of a limitation, which might take effect, according to its terms, beyond the line of perpetuity, effect must, of course, be given to the words limiting the operation of the instrument to the legal period. Even a general intention, appearing upon the will, that it

(s) *Brudenell v. Elwes*, 1 East, 442; 7 Ves. 382; *Adams v. Adams*, Cowp. 651.

(t) *Boughton v. James*, 1 Coll. C. C. 26, 44.

(u) *Kay*, 163.

(x) See per Kindersley, V.-C., *Harvey v. Stracey*, *supra*, p. 264.

(y) See *infra*, p. 281.

(z) 19 Beav. 565; 18 Jur. O. S. 1066.

(a) See *infra*, p. 282.

shall not be construed so as to operate contrary to the law, may incline the Court to a construction which will not be open to the objection of remoteness. In *Martelli v. Holloway* (b) Chelmsford, C., said:—"In endeavouring to ascertain the meaning of the testator in a clause of his will which is ambiguous, and which, read in a particular way, sins against the Rule as to Perpetuities, it is not improper to take into consideration that in the whole of the will he has carefully provided that the limitation of his estates shall not be open to the objection of being contrary to the law. And if the clause in question is open to two constructions, one of which would render it void upon a ground which the testator, throughout his will, seems to be guarding against, and the other of which is reconcilable with all his previously expressed intentions, there can be no doubt which of them ought to be adopted" (c).

Where a conveyance was made to trustees, upon trust, after the death of the settlor, to assure and convey the lands so that they should go along with a dignity "so far as the law would permit," with a proviso disposing of the rents and profits during every suspension or abeyance of the dignity "within the limits prescribed by law for strict settlements," it was held that the trust was not void for remoteness; that it required such a settlement of the lands to be made as, having regard to the Rule against Perpetuities, would effect the testator's intention (d).

The cases illustrating the effect upon the construction of an instrument of a reference in the instrument itself to the Rule against Perpetuities are, for the most part (e), those in which the question of remoteness

(b) L. R. 5 H. L. 532, 548; 42 L. J. Ch. 26.

(c) Cf. also *Christie v. Gosling*, L. R. 1 H. L. 279, 290; 35 L. J. Ch. 667.

(d) *Bankes v. Le Despencer*, 10 Sim. 576; 11 Sim. 508; 9 L. J. Ch. 185. The settlement which was

executed by order of the Court in this case is set out in 7 Jur. 210; and *Lewis Perp.* Appendix III: see also *supra*, p. 133.

(e) As to the effect of a direction to accumulate income so long as the law will allow, see *infra*, p. 330.

Chap. XIII. has arisen in connection with the settlement of heirlooms or real estate, so as to go along with either other property in settlement, or with a dignity. This class of cases is dealt with in a previous chapter (*f*). It will be sufficient here to state the general result of the decisions. The rule seems to be that, even where no executory trust is created, a direction that property shall accompany a dignity, or other settled property, so far as the law will permit, or so far as the rules of law and equity will permit, or so far as the different nature or tenure of the property will permit, is a disposition which operates only within the line of perpetuity. Where the limitation in question is by way of executory trust, there is no doubt that such is the rule.

Limitations void for remoteness may affect the construction of the rest of the instrument.

A limitation that is itself void for remoteness may be resorted to in order to construe another part of the instrument in which it is contained. The rest of the instrument must not be construed as if the void limitation were struck out, and as if no Rule against Perpetuities existed. Not only must full effect be given to the words importing remoteness, although they destroy the limitation in connection with which they are used, but a limitation which is itself too remote, although it cannot take effect as a limitation, will have its effect in determining the meaning of other parts of the instrument. Such void dispositions "are not the less part of his (the testator's) will, and to be resorted to as part of the context for all purposes of construction, as if no such rule (as that against Perpetuities) had been established" (*g*).

Estate void for remoteness not raised by implication.

Expressions, which ordinarily would raise an estate by implication, would probably be held not to have that effect, where the estate so raised would be void for remoteness (*h*).

(*f*) *Supra*, pp. 124, *seq.*

(*g*) Per James, L.J., *Heasman v. Pearce*, L. R. 7 Ch. 275, 283; 41 L. J. Ch. 705. And see *infra*, p. 281, as to the effect on vesting

of a gift over, which is itself void for remoteness.

(*h*) See *Chapman v. Brown*, 3 Burr. 1626; 6 Ves. 404.

And in *Forth v. Chapman* (i) we have seen that, for a Chap. XIII.
similar reason, a limitation of personalty upon the death
without issue of a previous taker, does not import a
general failure of issue, so as to destroy the limitation
over upon failure of his issue.

(i) *Supra*, p. 186.

CHAPTER XIV.

ABSOLUTE LIMITATION FOLLOWED BY MODIFYING CLAUSE
THAT IS TOO REMOTE. REJECTION OF WORDS IMPORT-
ING REMOTENESS.

Chap. XIV. THE Court will sometimes reject words, the effect of which would be to defeat the testator's intention by introducing the vice of remoteness into a limitation, which, apart from the words, is free from objection. This course is adopted where the limitation of an absolute interest is followed by a separate and distinct clause, modifying, in a manner not allowed by the law, the absolute interest previously limited. Thus a testatrix having, in exercise of a power of appointment contained in the settlement executed upon her marriage, appointed a fund to her five children absolutely, by a subsequent clause of the will, declared and appointed "so far as she lawfully or equitably could or might" that the share of each daughter should be held upon trust for the daughter, for life, for her separate use without power of anticipation, and after her death for her children; and, in default of children, in trust for such persons as the daughter should appoint; and in default of appointment for her next of kin. It was held that the daughters took absolute interests for their separate use without power of anticipation (*a*); and that the appointment to the daughters'

(*a*) As to the restraint upon anticipation, see *infra*, p. 281. In subsequent cases it has been held that

the restraint is void for remoteness; see *ibid*.

children was altogether void (*b*). Some reliance, in this case, was laid upon the words whereby the appointment was expressed to be made "so far as (the appointor) lawfully or equitably could"; but in a subsequent and very similar case it was held that those words are not material (*c*).

In *Carver v. Bowles* and *Kampf v. Joes* the limitations were in exercise of powers, but the rule above stated is not confined to cases where, besides being too remote, the clause is in excess of a power (*d*).

Whether the limitation is in exercise of a power, or not.

In *Ring v. Hardwick* (*e*) there was a bequest (not in exercise of a power) to the testator's widow for life, and after her death to the testator's four sons and daughters, by name; the sons' shares to be paid immediately, and daughters' shares to be invested and held upon trust for them respectively for life, with remainder (in effect) to such of their children as should attain twenty-five; and a gift over of the share of each daughter, in default of children attaining twenty-five, to the children attaining twenty-five of the other sons and daughters of the testator. It was held that the testator's daughters took absolute interests, and that the gifts to their children attaining twenty-five, and the gifts over in default of children attaining twenty-five, were void for remoteness.

The principle of these cases does not apply unless, in the first instance, there is a clear gift of the absolute interest. Thus in *Whitehead v. Rennett* (*f*) a testator gave and devised to trustees all his freehold, leasehold, and personal property upon trust for sale; the proceeds to be invested "for the benefit of" his three daughters; the interest of

(*b*) *Carver v. Bowles*, 2 Russ. & M. 301.

(*c*) *Kampf v. Joes*, 2 Keen, 756; 7 L. J. Ch. 63.

(*d*) See *Whitehead v. Rennett*, 22 L. J. Ch. 1020.

(*e*) 2 Beav. 352; 4 Jur. O. S. 242, *Arnold v. Congreve*, 1 R. & M. 209.

is a similar case; but so far as it decides that the gift over, in the case of grandchildren living at the testatrix' death, is invalid, is no longer law; see per Kindersley, V.-C., in *Knapping v. Tomlinson*, 34 L. J. Ch. 3, 10.

(*f*) 22 L. J. Ch. 1020.

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each daughter's share to be paid to her for life; on the death of each of the daughters one-half of her share to be paid to the children of the daughter so dying, at the age of twenty-one; and the interest of the other half to the same children (of the daughter so dying) for life, with remainder, as to the capital, to their children at twenty-one. It was held that the gift to children of grandchildren was void for remoteness, and that the daughters took for life only, and not an absolute interest (*g*).

Rejection of
clause of for-
feiture, or re-
mote gift
over.

So where an absolute limitation is followed by a clause of forfeiture or cesser, distinct from it, and not restricted as to its operation in point of time, and capable, according to its terms, of operating beyond the line of perpetuity, the previous limitation takes effect without regard to the forfeiture clause. Thus the donee (*h*) of a power of appointing amongst her children appointed by will to a daughter, who was born after the creation of the power, for life. The will contained a clause of forfeiture in case the daughter, either before or after the death of the appointor, married a Christian; with a gift over in the event of a daughter so marrying. The daughter having married a Christian after the appointor's death, it was held that the forfeiture clause was too remote and void, and that the absolute appointment took effect unaffected by it.

There are numerous instances of gifts to an individual or to a class, absolute in the first instance, and vesting within the limit of perpetuity, with words superadded purporting to defer the possession or enjoyment to an age or time beyond that limit, and a gift over upon death of the legatee or any of the class within the age or before the time named for possession. In all such cases the gift of the absolute interest remains, and the words, both as to the deferred enjoyment and the gift over, are rejected.

(*g*) In *Saumarez v. Saumarez*, 34 Beav. 432 (*supra*, p. 210), a trust for "the benefit of" a class of children, to be paid at twenty-five, was held

to be vested at birth.

(*h*) *Hodgson v. Holford*, 11 Ch. D. 959; 48 L. J. Ch. 548.

One instance of this class of cases may here be mentioned ; Chap. XIV.
 many others will be found stated in a previous part of
 this work (i). In *Hardcastle v. Hardcastle* (k) residuary
 estate was bequeathed upon certain trusts during A.'s life,
 and after A.'s death upon trust for all her children until
 they should respectively attain twenty-five, and, upon each
 child attaining twenty-five, upon trust, as to such child's
 share, for him or her, with a gift over in default of children
 attaining twenty-five or leaving issue. It was held that
 the children took interests which vested at birth, and that
 the gift over was void for remoteness.

It must be remembered that the rejection of words in a will on account of remoteness is not a rejection of them for purposes of construction. "It is against the settled rules of construction to strike out any words from a will because they offend against the perpetuity rule. For all purposes of construction the will must be read as if no such rule existed" (l). Thus a gift over upon death under twenty-four, which itself was void for remoteness, has been relied on as showing that a previous gift to the children of a living person vested at birth, and not at the age of twenty-four (m).

A restraint upon anticipation annexed to a limitation to a woman who was unborn at the date of the limitation is void for remoteness, and is rejected ; the limitation taking effect as if it had been omitted. In *Carver v. Bowles* (n) an appointment, under the usual power in a marriage settlement, to a daughter of the marriage, for her separate use without power of anticipation, was held good as to the restraint upon anticipation. This case has not been followed, and in several subsequent cases (o) it has

(i) *Supra*, pp. 206, *seq.*
 (k) 1 H. & M. 405 ; 7 L. T. N. S. 503.

(l) Per James, L.J., *Heasman v. Pearce*, L. R. 7 Ch. 275, 283.

(m) *Rowland v. Tawney*, 26 Beav. 67 ; *Bland v. Williams*, 3 M. & K.

411.

(n) 2 Russ. & Myl. 301.

(o) *Thornton v. Bright*, 2 M. & Cr. 230 ; 6 L. J. Ch. 121 ; *Fry v. Capper*, Kay, 163 ; *In re Teague's Settlement*, L. R. 10 Eq. 564 ; 22 L. T. N. S. 742 ; *In re Cunyng-*

Words re-
jected for re-
moteness
material for
purpose of
construction.

Restraint upon
anticipation
annexed to a
limitation to,
(1) an unborn
person ;

Chap. XIV. been held that, in such a case, the restraint upon anticipation is too remote and must be rejected. The question as to the validity of the restraint upon anticipation was discussed in a recent case (*p*) by Jessel, M.R., who, although he followed the cases which held the clause to be void for remoteness, doubted their correctness. The Master of the Rolls was of opinion that the restraint upon anticipation was an exception, as well to the Rule against Perpetuities, as to the general law that all property is alienable. Both the restraint upon anticipation and the Rule against Perpetuities were, he said, inventions of the Chancellors; the one in favour of married women, and opposed to the general law that all property is alienable; the other in aid of the general law, and in favour of alienation. But until the cases above cited are overruled it must be taken to be the law that a restraint upon anticipation cannot be attached to a limitation to an unborn person (*q*).

(2) A class including unborn persons.

Words in restraint of alienation, applicable to all the shares of all the members of a class comprising persons not necessarily born at the date of the limitation, may take effect as to some of the shares, though as to others they are rejected as being void for remoteness. And the same rule applies to a direction to settle, in a manner not allowed by the Rule against Perpetuities, the shares of the members of a class to which there has been a previous valid and absolute limitation.

Limitation to a class followed by a

Thus in *Wilson v. Wilson* (*r*) a testator bequeathed a fund to trustees, upon trust for such of the present and

hame's Settlement, L. R. 11 Eq. 324; 40 L. J. Ch. 247; *Cooper v. Laroche*, 17 Ch. D. 369; *In re Michael's Trusts*, 46 L. J. Ch. 651. In *Hodgson v. Halford*, 11 Ch. D. 959; 48 L. J. Ch. 548, the point does not appear to have been decided (as regards the plaintiff's share).

(*p*) *In re Ridley, Buckton v. Hay*,

11 Ch. D. 645; *nom. Buckton v. May*, 48 L. J. Ch. 563.

(*q*) In a subsequent case, *Cooper v. Laroche*, 17 Ch. D. 369; 29 W. R. 438, Malins, V.-C., expresses concurrence with the cases questioned by Jessel, M.R., in *In re Ridley*.

(*r*) 4 Jur. 1076; 28 L. J. Ch. 95.

future children of A. as should be living at the death of the testator's widow, as tenants in common. And he declared that, as to such of the children as should be daughters, their respective shares should be held by the trustees upon trust for each daughter for her separate use for life without power of anticipation, with remainder to her children. In the case of a daughter who was living at the testator's death, it was held that the limitation to her children was not too remote; and the reasoning which supported the gift to the children applies equally to the restraint upon alienation.

The validity of the restraint upon anticipation in such cases is established by a recent decision of Hall, V.-C. (*s*). A husband and wife, who had two children, daughters, assigned a sum of money to trustees, upon certain trusts during the joint lives and the life of the survivor of them, the husband and wife, and after the death of the survivor, for their children as they or the survivor of them should appoint, and, in default of appointment, for all their children who, being sons, should attain twenty-one, or, being daughters, should attain that age, or marry, equally, and, as to daughters' shares, for their separate use without power of anticipation. There were no children of the marriage other than the daughters, and no appointment was made. It was held that the daughters were restrained from anticipation.

The facts in *Wilson v. Wilson* and *Herbert v. Webster* did not call for a decision as to the effect of the restraint upon anticipation in the case of children unborn at the testator's death. It was assumed throughout, that, as to such children, it would be void for remoteness (*t*); but it

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direction to settle the shares, which, as to some of the members of the class, is void for remoteness.

(*s*) *Herbert v. Webster*, 15 Ch. D. 610; 49 L. J. Ch. 620; the point under discussion, not having been called to the attention of the Court in *In re Ridley*, 11 Ch. D. 645; 48 L. J. Ch. 563; or *In re Michael's Trusts*,

46 L. J. Ch. 651, the Vice-Chancellor declined to follow those cases.

(*t*) See *In re Ridley*, and the cases cited above, p. 281, as to the restraint upon anticipation in such a case.

Chap. XIV. was held that, nevertheless, it was valid as regards the other children.

In *Lyddon v. Ellison* (u) a direction to settle the shares of a class comprising persons possibly unborn at the testator's death, which, if executed literally, would have been void for remoteness, was supported as an executory trust, to be carried out so that it should not be void for remoteness as to any of the shares. A testatrix gave personal property to trustees in trust for the younger children of her daughter, A., and directed that, upon their marriage, their shares should be settled upon them for life, with remainder to their children. It was held that the direction to settle was not void for remoteness; that it was an executory trust to be carried out *cy près*, that is, in such a way as to effect the intention of the testatrix so far as the rules of law would permit.

It is the same with any other condition or restriction annexed to a valid limitation of an absolute interest to a class; as, for example, a direction to settle the shares, as in *Wilson v. Wilson* (x), or a gift over by way of substitution, or otherwise (y). The superadded clause may be either void for remoteness altogether, or it may be valid as to some of the shares, and void for remoteness as to others. In either case, it is rejected, so far as it transgresses the Rule against Perpetuities. As regards those shares upon which it cannot operate, the previous limitation takes effect, as if the clause in question were struck out (z).

Gift of a specified sum to each member of a class including remote objects.

There is another class of cases where the partial rejection of a limitation for remoteness does not prevent its operation in the cases where there is no remoteness. This is where the limitation, though in form single, operates as a series of separate and distinct limitations to different

(u) '19 Beav. 565; 18 Jur. O. S. 226; 9 L. J. Ch. 226.
1066.

(x) *Ubi supra*.

(y) *Blease v. Burgh*, 2 Beav. 221,

(z) See *Pearks v. Mosley*, 5 Ap. Ca. 714, 719; 50 L. J. Ch. 57.

persons. Thus a bequest of £1000 to each of the grandchildren of a specified person is, in effect, a series of separate and distinct bequests to individuals; and takes effect as to those who are within the line of perpetuity—that is to say, in the case of grandchildren born at the testator's death—and is void for remoteness as to the others (*a*).

The cases establishing this rule are *Griffith v. Pownall* (*b*), *Storrs v. Benbow* (*c*), *Cattlin v. Brown* (*d*), *Knap-ping v. Tomlinson* (*e*), *Wilson v. Wilson* (*f*), all which cases are fully stated elsewhere (*g*). To these may be added the cases above mentioned in which a restraint upon anticipation was held valid, as to some of the interests limited, though void for remoteness as to others; the rules established by the two classes of cases being very similar.

Some difficulty has been created by *Greenwood v. Roberts* (*h*), and *Webster v. Boddington* (*i*). As to the former case, it is submitted that it cannot be reconciled with *Cattlin v. Brown*, *Storrs v. Benbow*, and the cases following them. In *Greenwood v. Roberts* there was a gift of an annuity to the testator's brother, and, after the death of the brother, to such of his children as should be then living equally for their lives; with a provision that at the death of any of them, so much capital as produced the annuity to which the child so dying had been entitled during his or her life should be converted into money and divided equally amongst the children of him or her so dying, as they should severally attain twenty-one; and he gave them vested interests therein, and directed, that if any child of his brother should, at his decease, be dead, and had left issue, such issue should take the share the

(*a*) *Storrs v. Benbow*, 3 D. M. & G. 390; 22 L. J. Ch. 823.

(*b*) 13 Sim. 393.

(*c*) *Ubi supra*.

(*d*) 11 Ha. 372; 1 W. R. 533.

(*e*) 34 L. J. Ch. 3.

(*f*) 28 L. J. Ch. 95; 4 Jur. N. S. 1076.

(*g*) See pp. 100, 255, 283, and *sup*.

(*h*) 15 Beav. 92; 21 L. J. Ch. 262.

(*i*) 26 Beav. 128.

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parent would have had if he had outlived the brother. Wood, V.-C., distinguishes this case from *Cattlin v. Brown*, on the ground that in *Greenwood v. Roberts* the children of the brother who were living at the testator's death might all have been dead at the death of the brother. As pointed out by Kindersley, V.-C. (*k*), the same observation applies to *Cattlin v. Brown* (as regards the children of Thomas Bannester Cattlin); and in *Wilson v. Wilson* (*ubi supra*), where the distinction in question existed, it did not affect the decision.

In *Webster v. Boddington* (*l*) the gift was to the testator's daughter for life, with remainder to her present and future children and the issue of such children, who, being sons, should attain twenty-one, or being daughters, should marry with consent of the daughter, equally; such issue to take their parent's share. It was held that the gift was to a class to be ascertained at too remote a period, and therefore void for remoteness. In this case, Romilly, M.R. (*m*), approves the distinction taken by Wood, V.-C., and above mentioned, between *Greenwood v. Roberts* and *Cattlin v. Brown*; *sed quære*.

Knapping v. Tomlinson, *ubi supra*, was a decision by Kindersley, V.-C., upon a devise in the same words in the same will as that in *Cattlin v. Brown*. Though differing from Wood, V.-C., as to the distinction taken by him between *Greenwood v. Roberts* and *Cattlin v. Brown*, Kindersley V.-C., approves and follows the decision in *Cattlin v. Brown*. The judgment in *Knapping v. Tomlinson* contains an exhaustive review of the cases under discussion.

Arnold v. Congreve (*n*), so far as it conflicts with *Cattlin v. Brown*, must be considered as overruled. The point under discussion was not there considered by the Court (*o*).

(*k*) In *Knapping v. Tomlinson*, 34 L. J. Ch. 3, 8.

(*l*) 26 Beav. 128.

(*m*) P. 136.

(*n*) 1 Russ. & Myl. 209.

(*o*) See per Kindersley, V.-C., in *Knapping v. Tomlinson*, *ubi supra*.

The class of cases of which *Storrs v. Benbow* and *Cattlin v. Brown* are examples must be distinguished from those discussed in former chapters, where the limitation is to a class including possibly remote objects (*p*), or to the member of a similar class or series of persons successively answering a common description who first acquires a given qualification (*q*), or where the limitation is of successive life interests to a similar class or series (*r*). In such cases we have seen that the limitation cannot be good as to some members of the class, and void for remoteness as to the others. If any one member of the class or series is, or by possibility may be, beyond the line of perpetuity, the whole is void for remoteness.

- (*p*) As in *Pearks v. Moseley*, *supra*, *supra*, p. 113.
 p. 87. (*r*) See *supra*, pp. 119, *seq.*
 (*q*) As in *Dungannon v. Smith*,

CHAPTER XV.

EFFECT OF LIMITATION VOID FOR REMOTENESS ON SUBSEQUENT LIMITATIONS.

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A limitation
ulterior to
another that
is void for re-
moteness can-
not take effect.

A LIMITATION ulterior to or dependent or expectant upon a previous limitation that is too remote cannot take effect. Although the object is a competent object and the limitation is so expressed that it must take effect, if at all, within the legal period, and although the previous remote limitation never vests, or its object never exists, the result is the same. "There is nothing better settled than that, when a gift is void for remoteness, its avoidance does not bring into life, or accelerate, the subsequent limitations, but, on the contrary, they are equally void" (a). Thus a limitation to the first son of A. who shall attain a given age or take holy orders, and if no son attains the age or takes orders to B., is void as to B. (b).

Though it is
such that it
must take
effect, if at all,
within the
legal period.

It is immaterial that the ulterior limitation is such that it must take effect, if at all, within the legal period. In *Palmer v. Holford* (c) there was a bequest to a class to be ascertained at too remote a period, with a gift over on failure of the class, if he should be then living, to A., a person alive at the testator's death. It was held that the gift over could not take effect. In *re Thatcher's Trusts* (d)

(a) Per Sir E. Sugden, 1 Dr. & Wells, 2 H. Bl. 358.
W. 509, 539, 540. (c) 4 Russ. 403.

(b) *Proctor v. Bishop of Bath and* (d) 26 Beav. 365.

the bequest was to A. for life, with remainder to such of his children as should attain twenty-five, and in case no child attained twenty-five to B., a living person, for life. It was held that the gift to B. was void.

So a limitation by way of remainder expectant upon the determination of a previous limitation that is too remote is not accelerated, and is altogether void. In *Robinson v. Hardcastle* (e) there was an appointment, in exercise of a power in a marriage settlement in favour of children of the marriage, to a son (unborn at the creation of the power), for life, with remainder to his children, and in default of children to a daughter of the marriage. The son died childless. It was held that the appointment to the daughter could not take effect; not because it was subsequent to the appointment to grandchildren, who were strangers to the power (f), but because it could not be supposed that the daughter was intended to take to the exclusion of persons (children of the son) to whom prior interests were limited.

A remainder expectant upon a limitation that is too remote is not accelerated.

Robinson v. Hardcastle.

The rule giving an effect destructive of subsequent limitations to a limitation which is itself void for remoteness is not confined to limitations in exercise of a power. In *Burley v. Evelyn* (g) a testator bequeathed a sum of money upon trust to pay the income to A. for life, and after his death to A.'s first unborn son for life, and after the death of such son to the son's child or children, and "for default of such issue" to other persons who were competent objects. It was held that the ultimate gift did not take effect upon the death of A. unmarried. "There is nothing in this will which authorises me to say that the words 'in default of issue male of John' mean a total failure of the issue of John or his sons at any particular time. But it is plain to

(e) 2 Bro. C. C. 22, 344; 2 T. R. 241, 781. See also *Routledge v. Dorril*, 2 Ves. 357.

(f) The mere fact of their being strangers would not have made the

appointment to the daughter invalid; *Crozier v. Crozier*, 3 Dr. & War. 353.

(g) 16 Sim. 290; 12 Jur. O. S. 712.

Chap. XV. me that the testator intended all the limitations in the will, after the limitation to John for life, to take effect as remainders. He has, however, so expressed his intention that the law will not allow it to prevail" (*h*).

It is difficult to distinguish this case from the following, in which the House of Lords discovered a sufficient expression of intention that the limitation should take effect in the alternative. In *Williams v. Lewis* (*i*) the testator bequeathed leaseholds to trustees upon certain trusts until his grandson Benjamin (the only son of his son Benjamin) should attain twenty-one, and upon his attaining twenty-one upon trust for him for life, and after his death upon trust for his heirs male, and in default of heirs male upon trust for the second and every other son of his son Benjamin and the heirs male of their bodies; and in default of such issue upon trust for his son Lewis and his sons in similar terms; and in default of issue of Lewis, upon trust for the son of his daughter Abigail in a similar way. Benjamin and Lewis having died without issue male, it was held that the gift to the son of Abigail took effect as an alternative limitation, and that it did not fail as a limitation in remainder after a limitation which was void for remoteness.

It has already been stated that a disposition of personalty or heir-looms to follow settled realty does not fail for remoteness because none of the class to whom prior estates tail in the realty are limited ever come into existence (*k*). The limitation is taken to be in the alternative, as in the case last mentioned,—to the issue if there are any, if none, over.

A limitation ulterior to or expectant upon another that is too remote must be distinguished from a limitation expressed to take effect upon alternative events, of which

(*h*) Per Shadwell, V.-C., 16 Sim. 505; *nom. Lewis v. Hopkins*, 3 Drew. 275. 668.

(*i*) 6 H. L. C. 1013; 28 L. J. Ch. (*k*) *Supra*, p. 127.

one is too remote and the other not. Such a limitation will take effect if the latter event happens, and the fact that the alternative limitation is void for remoteness is immaterial. Thus a limitation to A., if B. dies without issue living at his death, or if B. dies leaving issue living at his death and such issue afterwards fail, takes effect if A. dies without issue living at his death (*l*). And whether the remote alternative comes before or after the other in order of limitation is clearly immaterial. This subject is fully considered in a former chapter (*m*).

The decision of the House of Lords in *Tregonwell v. Sydenham* (*n*) has been questioned by Lord St. Leonards, as being contrary to the rule that a limitation expectant upon another that is void for remoteness cannot take effect (*o*). In that case land was devised in remainder expectant upon a term limited to trustees upon trust to raise a sum of money, and therewith buy lands to be conveyed to uses which, in the event, proved too remote. It was held that the heir-at-law took the term as a chattel interest carved out of the real estate which was undisposed of by the will. The question was there treated as being, whether the devise was of the lands, subject to the term, so far as the trusts of the term were capable of being executed; or whether the term was expressly excepted out of the devise. The devise in *Tregonwell v. Sydenham* was held to be of the latter description.

The reason, above stated, for the invalidity of a limitation by way of remainder (*p*) after a limitation that is too remote, applies also to a limitation depending upon the contingent determination, within the legal period, of a preceding limitation that is void for remoteness. "Where there are gifts over which are void for perpetuity,

A limitation depending upon the contingent determination, within the legal period, of a prior limitation cannot take effect.

(*l*) *Longhead d. Hopkins v. Phelps*, 2 W. Bl. 703.

(*m*) *Supra*, pp. 74, seq.

(*n*) 3 Dow. 194; *supra*, p. 136.

(*o*) Sugden's Law of Property,

p. 362, note (*s*), "I prefer the decision of the Court of Exchequer."

(*p*) *Robinson v. Harcastle*, *supra*, p. 289.

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and there is a subsequent and independent clause on a gift over, which is within the line of perpetuities, effect cannot be given to such a clause, unless it will dovetail in, and accord with, previous limitations which are valid" (q). The case which establishes this rule is *Beard v. Westcott* (r). There a testator devised lands to his grandson, A., for ninety-nine years if he should so long live, with remainder to the grandson's (unborn) first son for years or life as aforesaid; with remainders (in effect) to the first son of such first son of A., and successive generations of sons, in like manner; "and in case there shall be no issue male of A., nor issue of such issue male at the time of his death, or in case there shall be such issue male at that time, and they shall all die before they respectively attain their respective ages of twenty-one years without lawful issue male," to B. and his issue. The question was whether, the limitations to issue of A. beyond his first son being clearly void, the limitation to B. would take effect in the event of issue of A. alive at his death afterwards dying under twenty-one without issue. After much discussion, and contrary decisions, in the Courts of Common Pleas and King's Bench, it was finally held that the devise could not take effect; "not because it was not within the line of perpetuity, but expressly upon the ground that that limitation over was never intended by the testator to take effect, unless the persons whom he intended to take under the previous limitation would, if they had been alive, been capable of enjoying the estate; and that he did not intend that the estate should wait for persons to take in a given event, when the person to take was actually in existence, but could not take" (s). If, for instance, A. had died leaving issue only a grandson *en ventre*, that child could not take, because of remoteness;

(q) Per Lord St. Leonards, *Monypenny v. Dering*, 2 D. M. & G. 145, 182; 22 L. J. Ch. 313; speaking of *Beard v. Westcott*, *infra*.

(r) 5 Taunt. 393; 5 B. & Ald. 801; T. & R. 25.

(s) Per Lord St. Leonards, 2 D. M. & G. 182.

and until his birth, and twenty-one years afterwards, no person would be entitled to a vested interest under the will, although the person intended to take was in existence. Chap XV

A bequest of a sum to be applied, partly to an object that is too remote, and as to the residue to a valid object, takes effect, it seems, as to the whole sum in favour of the valid object. This appears to be the effect of recent decisions as to gifts of a sum upon trust to keep up a tombstone, and subject thereto, or as to the surplus, upon trust for a valid object. The point, however, cannot be considered free from doubt, for the cases are conflicting (*t*). It is difficult to see why, if the amount required for the invalid object can be ascertained, the gift should take effect as to that part in a manner not intended by the testator. It does not appear to have been held or suggested in any of the cases, that the failure of the primary trust invalidated the gift of the surplus, because of the remoteness of the primary gift. The question discussed was, whether the gift of the surplus was not void for uncertainty as to the amount; or, if valid, upon how much of the fund it operated.

It will be seen elsewhere that a limitation subject to a power that is void for remoteness takes effect entirely unaffected by the void power (*u*); and that a residuary appointment, subject to a previous partial appointment that fails for remoteness, carries the property which was the subject of the invalid appointment (*x*); also that the execution of a power which is void for remoteness raises

(*t*) *Hunter v. Bullock*, L. R. 14 Eq. 45; 41 L. J. Ch. 637; *Fisk v. Att.-Gen.*, L. R. 4 Eq. 521; *Dawson v. Small*, L. R. 18 Eq. 114; 9 Ch. 651; 43 L. J. Ch. 406; *In re Williams*, 5 Ch. D. 735; 47 L. J. Ch. 92; *In re Birkett*, 9 Ch. D. 576; 47 L. J. Ch. 846; but see *contra Fowler v. F.*, 33 Beav. 616; 10 L. T. N. S. 682; *Chapman v. Brown*,

6 Ves. 404; 3 Burr. 1626; *Att.-Gen. v. Hinman*, 2 J. & Cr. 270; *Cramp v. Playfoot*, 4 K. & J. 479; *Limbrey v. Gurr*, 6 Mad. 151; *Mitford v. Reynolds*, 1 Ph. 185; *Magistrates of Dundee v. Morris*, 3 Macq. 134; *Hoare v. Osborne*, L. R. 1 Eq. 585; 35 L. J. Ch. 345.

(*u*) *Supra*, p. 259.

(*x*) *Supra*, p. 259.

Chap. XV. no case of election in favour of the appointees, as against persons entitled to the subject matter of the power and taking benefits under the instrument executing the power (*y*).

(*y*) *Supra*, p. 249.

CHAPTER XVI.

CHARITABLE TRUSTS.

PROPERTY held upon trust for charitable purposes is for **Chap. XVI.**
 ever inalienable; but upon grounds of public policy the law permits the creation of such trusts; and a disposition of real or personal property in favour of charity is free from objection on the ground of remoteness. "The law of England has however made an exception also (from the Rule against Perpetuities) . . . on grounds of public policy in favour of gifts for purposes useful and beneficial (*a*) to the public, and which, in a wide sense of the term, are called charitable uses" (*b*).

Charitable trusts exception from Rule against Perpetuity.

Charitable purposes have been thus defined by Lord Langdale (*c*):—"A charitable purpose must be, either one of those purposes denominated charitable in the statute of Elizabeth (43 Eliz. c. 4), or one of such purposes as the Court construes to be charitable by analogy to those mentioned in the statute." Those mentioned in the statute are as follows:—Relief of aged, impotent, and poor people; maintenance of sick and maimed soldiers and mariners; schools of learning, free schools, and scholars in the universities; repairs of bridges, ports, havens, causeways,

What are charitable purposes.

(*a*) A "charitable" purpose is not necessarily useful or beneficial; see per Campbell, C., in *Jeffries v. Alexander*, 8 H. L. C. 594, 648; 7 Jur. N. S. 221; and per Selborne, C., in *Farrer v. St. Catharine's College*, L.

R. 16 Eq. 19, 24; 42 L. J. Ch. 809.

(*b*) Per Sir M. E. Smith, *Neo v. Neo*, L. R. 6 P. C. 381, 394.

(*c*) In *Kendall v. Grainger*, 5 Beav. 301; 11 L. J. Ch. 405.

Chap. XVI. churches, sea banks, and highways; education and preferment of orphans; relief, stock, and maintenance of houses of correction; marriages of poor maids; supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed; relief and redemption of prisoners and captives; aid and ease of any poor inhabitants concerning payment of fifteens and setting out of soldiers or taxes.

Amongst the purposes which the Courts have held to be charitable, by analogy to those above mentioned, are trusts for the following persons or purposes:—The poor, generally, or of a particular locality or family; or poor relations; persons emigrating; widows and orphans; unsuccessful literary men; decayed tradesmen; for releasing debtors; the master and fellows of a college; the master and governors of a hospital; a priest and his successors; the advancement of learning and education; building a school, or a school for the sons of gentlemen; maintaining a schoolmaster; founding a scholarship, fellowship, or lectureship at Oxford or Cambridge; Queen Anne's Bounty; building, or repairing, or ornamenting, a church, chimes, or organ; distributing bibles or religious books; a minister for preaching; an organist for playing; and, generally, any public religious object whatever, provided the religion is not one subversive of morals, and the object is not superstitious; rebuilding St. Paul's Cathedral, after the Great Fire; building a Sessions House; paving, lighting, or improving a town; the British Museum; a public garden; a lifeboat; advancing the study of animals useful to man; the Chancellor of the Exchequer for the benefit of the country. This list might be largely extended (*d*).

A case recently before the House of Lords seems to extend the class of cases excepted from the operation of the Rule against Perpetuities, on the ground of the trust

(*d*) A collection of the authorities will be found in the notes to *Corbyn v. French* in Tudor's Leading Cases

in Conveyancing, and Whiteford's Law of Charities, pp. 16, *seq.*

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being charitable, beyond any of the instances above mentioned. In *Goodman v. Mayor &c. of Saltash* (e) "the free inhabitants of ancient tenements" of the borough of Saltash claimed a right of fishing for oysters in the tidal river Tamar from the 2nd of February to Easter Eve in every year. The Mayor and Corporation of the borough resisted the claim, alleging that they were entitled to a several fishery in the river, and founding their title on acts of ownership from time immemorial. There was evidence of such acts on the part of the Corporation; and it was alleged in the special case, and assumed to be the fact, that the free inhabitants had from time immemorial exercised the right claimed. It was held by the House of Lords (Lords Selborne, Cairns, Bramwell, Watson, and Fitzgerald), Lord Blackburn dissenting, that the Corporation were entitled to the several fishery, subject to a condition, or qualification, contained in the original grant, which constituted a charitable trust of the fishery, during part of the year, in favour of the free inhabitants. Lord Blackburn was of opinion that the alleged condition or trust in favour of the free inhabitants was not charitable, and was void for perpetuity (f).

In this case *Wright v. Herbert* (g) was cited with approval by Lord Selborne. Lord Macclesfield there established, as a charitable trust, an ancient grant of land for the pasture during three months of the year of the cows of "as many of the inhabitants" of a certain village "as were able to buy three cows," and, during the rest of the year, "to be in common for all the inhabitants."

It is doubtful whether the latitude allowed by law to testators in the matter of charitable gifts has been uni-

(e) *Goodman v. Mayor, &c. of Saltash*, 7 Ap. Ca. 633; in the Courts below, 5 C. P. D. 431; 7 Q. B. D. 106; 49 L. J. C. P. 565; 50 L. J. C. P. 508.

(f) See 7 Ap. Ca. 662; for the opinions of Lords Selborne and Cairns, *contra*, see *ibid.* 642, 650.

(g) 9 Mod. 64.

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formly beneficial to the public. Probably the range of "charitable" purposes will not be extended. "A man," said Lord Campbell, "has a natural right to enjoy his property during his life and to leave it to his children at his death; but the liberty to determine how property shall be enjoyed *in sæcula sæculorum*, when he who was once the owner of it is in his grave, and to destine it, in perpetuity, to any purposes, however fantastical, useless, or ridiculous, so that they cannot be said to be directly contrary to religion and morality, is a right and liberty which, I think, cannot be claimed by any natural or divine law, and which, I think, ought by human law to be strictly watched and guarded" (*h*).

If the purpose of a gift is charitable, the Rule against Perpetuities is altogether excluded. It is immaterial whether the gift is to an individual, or to an association of persons, corporate or unincorporated; and whether, in the latter case, the donees are a class of persons having, or intended to have, a perpetual existence or not (*i*). And it would seem that the Rule is excluded if the purpose of the gift is charitable within the wide meaning of that term as above defined; and that, although the exception of charitable trusts from its operation is said to be founded on public policy (*k*), a trust which is neither beneficial nor useful to the public, but which is, in the legal sense of the word, charitable (*l*), cannot be void for perpetuity.

Trusts for
voluntary
societies exist-
ing for reli-
gious, or social,
purposes.

The question has arisen in some recent cases whether trusts for the benefit of voluntary societies established and existing for religious, devotional, or social purposes are charitable, or whether gifts of property to such societies are void for remoteness. A voluntary society or institution, unincorporated, but by its constitution intended to

(*h*) Per Campbell, C., *Jeffries v. Alexander*, 8 H. L. C. 594, 648; 7 Jur. N. S. 221.

(*i*) See *Cocks v. Manners*, *infra*,

p. 300; *Harbin v. Masterman*, L. R. 12 Eq. 559; 40 L. J. Ch. 760.

(*k*) See *supra*, p. 295.

(*l*) See *supra*, p. 295, note (*a*).

exist, or capable of existing, for an indefinite period, and the primary object of which is the benefit of its members for the time being, is not a charitable institution. Unless a power of alienating its property is provided by its rules or constitution, a gift to such a society is void for remoteness. It appears that the power inherent in a voluntary association of individuals, who are unanimous, to dissolve the association, or to abrogate or alter the rules or contract of association, and so to acquire a power of alienating the property of the association, will not aid the gift. It has been so held where the gift was in such terms as to make the subject of it part of the permanent property of the society, and not part of its income, to be spent upon the current expenses of the year (*m*).

The gift in *Carne v. Long* (*n*), the case above referred to, was of real estate by will for the benefit of the Penzance Library. This library was established and kept up by subscription, and was for the use of subscribers only, who were elected by ballot. The property of the library was vested in officers chosen by the subscribers as trustees for the subscribers. One of the rules provided that the library should not be broken up so long as ten subscribers remained. In the judgment of Lord Campbell, C., is the following passage: "The gift is to the trustees for the time being of the society, and their successors, to be held by them and their successors for ever, they holding it for the use, benefit, maintenance, and support of the library. If the devise had been in favour of the existing members of the society, and they had been at liberty to dispose of the property as they might think fit, then it might, I think, have been a lawful disposition not tending to a perpetuity. But looking to the language of the rules of this society it is clear that the library was intended to be a perpetual institution, and the testator must be presumed to

(*m*) *Carne v. Long*, *infra*.

589; 29 L. J. Ch. 503.

(*n*) 2 D. F. & J. 75; 27 L. J. Ch.

Chap. XVI. have known what the regulations were. By one of these it is provided that the society is not to be broken up so long as ten members remain. The devise, therefore, is for the benefit of a subsisting society, and one which is intended to subsist so long as ten members remain, and the property comprised in the devise is, therefore, to be taken out of commerce and to become inalienable, not for a life and lives in being and twenty-one years afterwards, but so long as ten members of the society remain " (o).

A bequest to the Ringwood Friendly Society (p), a society whose members provided by subscription and fines a fund for their common benefit in case of sickness, lameness, or old age, was held by Hall, V.-C., on the authority of *Carne v. Long*, to be non-charitable, and void as aiming at creating a perpetuity.

But a gift to a non-charitable society, as a club or a limited company, so constituted that it may exist for an indefinite time, is not void for remoteness merely because it is possible that the society may have perpetual existence. If, as in *Carne v. Long* (*supra*), effect can only be given to the testator's intentions by a trust to apply the income of the property for an indefinite time in accordance with the rules of the society which regulate the application of income, the gift is void for remoteness. But if, as in the case mentioned below (*Cocks v. Manners*), the gift is absolute, and unfettered by any trust which prevents its immediate alienation, there is no perpetuity, and the gift is valid.

Cocks v. Manners.

In *Cocks v. Manners* (q) the testatrix bequeathed pure and impure personalty to a Dominican convent at C., and to the Sisters of Charity of St. Paul at O.; and directed the payment to be made to the Superiors of the two Institutions. The former Institution was a voluntary

(o) It will be observed that the gift being of real estate by will would have been void if charitable.

497; 45 L. J. Ch. 199.

(q) L. R. 12 Eq. 574; 40 L. J. Ch. 640.

(p) *In re Clark's Trusts*, 1 Ch. D.

association of persons living together under a Superior for the purpose of sanctifying themselves by prayer and contemplation. The latter was a similar association, whose primary purpose was the sanctification of the members for the time being; as a means to which they taught the poor and nursed the sick. It was held by Wickens, V.-C., that the Sisters of Charity were a charitable institution, and that the Dominican convent was not; also that the gift to the convent was not void for perpetuity. "As regards the Dominican convent the case is a little different and more difficult. There are two questions, whether the gift is a charitable gift, and whether it is good, if not charitable." The Vice-Chancellor proceeds to define a charitable gift, and concludes that the gift to the convent, a voluntary association of women formed for the purpose of working out their own salvation by religious exercises and self-denial, and not by external charitable work, is not charitable (*r*). "The question remains whether the gift to the Dominican convent, which seems to me not charitable, is void for perpetuity. It is argued that it is a gift in trust for the purposes of a perpetual institution, and therefore on a perpetual trust, and *Carne v. Long* (*s*) is relied upon. That case does not, I conceive decide that a gift to a perpetual institution, not charitable, is bad—for instance, a gift to a club or a limited company—but merely that the gift in question there was a gift which the trustees could only give effect to by holding the property (which seems to have been all real estate) for ever and applying the income according to the rules. Nothing of the sort is directed here. The gift is ordered to be paid to the Superior for the time being; and the Superior, when she receives it, will be bound to account for it to the convent; to put it, so to speak, in a common chest, and when there it will be subject to no trust which

(*r*) Cf. *Kehoe v. Wilson*, 7 L. R. Ir. 10. (*s*) *Supra*, p. 299.

Chap. XVI. will prevent the existing members of the convent from spending it as they please. It would, I conceive, be an extreme stretch of the Rule against Perpetuity to hold that it applies to a gift of this sort" (t).

In re Dutton. The Athenæum and Mechanics Institute at Tunstall was established for literary purposes, and was kept on foot by the subscriptions and for the benefit of the subscribers. The property of the Institute was vested in trustees. A testator left a sum of money to be applied in paying off a mortgage on the building occupied by, and belonging to, the Institute. It was held that the gift was void as tending to a perpetuity (u). In his judgment, Kelly, C.B., said: "There are several cases, amongst others *Thomson v. Shakspeare* (x), which go to show that where, by the constitution of the society, there is nothing necessarily to put an end to its existence, so that it may last an indefinite time, and the gift is in such terms as to make the subject of it an accession to the capital or permanent property of the society, and not a sum to be brought into the annual accounts as a part of the year's income, to be disposed of by the then members, then there is a tendency to a perpetuity, and the bequest is void." Huddleston, B., appears to have considered that if the members for the time being had been competent to dissolve and divide the property of the Institute amongst themselves, the decision would have been different. In the case before him such a division of the property was prevented by the Literary and Scientific Institution Act (17 & 18 Vict. c. 112, s. 30.) But it seems doubtful whether the existence of such a power would make valid a trust which, apart from the power, creates a perpetuity (y).

Thomson v. Shakspeare.

In *Thomson v. Shakspeare* (z) a testator bequeathed

(t) *Cocks v. Manners* was recently followed in Ireland, *In re Delany's Estate*, 9 L. R. Ir. 226.

(u) *In re Dutton*, 4 Ex. D. 54; 48 L. J. Ex. 350.

(x) *Infra*, p. 303.

(y) See *supra*, p. 299.

(z) *Johns*. 612; 1 D. F. & J. 399; 29 L. J. Ch. 140, 276.

£2500 to his trustees and executors, to be laid out by them, with the concurrence of some persons described in the will as trustees of Shakspeare's house, in forming a museum at Shakspeare's house, and for such other purposes as the trustees of the will in their discretion should think fit, in order to give effect to his wishes. He also devised a rent-charge for the support of a custodian of Shakspeare's house. That house had been purchased by a number of subscribers, and conveyed to a committee, for the purpose of being preserved as a memorial to Shakspeare. The testator had, during his life, vested money in trustees for the purpose of keeping the house in preservation and repair. It was held by Lord Campbell, C., that the gifts were void, because, assuming that they were for the purpose of erecting and endowing in Shakspeare's house at Stratford-on-Avon a museum which was to endure *in sæcula sæculorum*,—"that is a perpetuity, and, not being a charity, it is void." By Knight Bruce, L.J., they were held to be void because the gifts were upon a non-charitable trust, which possibly might be incapable of being executed or enforced. Turner, L.J., appears to have held the gifts void on both grounds.

Land granted to a community, or aggregate body of men, not incorporated, cannot, by virtue of the original grant alone, be transmitted to their successors (*a*). The societies of the Inns of Court are not corporations, but voluntary societies. They have held the land which they now occupy for centuries. It is said that, in order to continue the succession, as soon as the number of the trustees (the benchers), in whom the land is vested, is considerably reduced, the survivors convey the lands to a person in trust to convey to all the existing members of the bench (*b*).

By virtue of 5 & 6 Will. IV. c. 76, s. 2, certain property Property held by municipal

(*a*) 10 Co. 26, b. Kyd on Corporations, 6.

(*b*) Kyd on Corporations, 6, 7; Grant on Corporations, 58, note, *a*.

Chap. XVI. referred to in the Act may be held by a municipal corporation for the benefit of the freemen of the borough for ever (c). The effect of the statute is to prevent the objection of remoteness being raised to the trust. Whether a limitation of property, upon trust for the inhabitants, or freemen, of a borough, could be supported as a charity, or whether it would be void for remoteness, is not clear. From *Carne v. Long* (d), and other cases mentioned above, such a gift would seem to be not charitable; but from a recent case before the House of Lords it would seem that it is not void for perpetuity (e).

Trust for the poor of a specified family.

A gift to the poor of a particular family, or to the poor descendants of a specified person for ever, creates a valid charitable trust for successive generations of poor persons of the specified class. In *White v. White* (f) the gift was for putting out as apprentices "our poor relations," meaning the poor of two families. In *Bernal v. Bernal* (g) it was in favour of relations "if they shall come to want." In *Attorney-General v. Price* (h) it was upon trust for ever to distribute a yearly sum amongst "my poor kinsmen and kinswomen and amongst their issue which shall dwell within the county of Brecon." In *Isaac v. De Friez* (i) it was to the "poorest" relations of the testator and his wife. In this case "poorest" was held to mean "very poor"; for under such a gift no one can take who is not poor, in the sense of being an object for charity (k). In *Gillam v. Taylor* (l) the gift was for "such of the lineal descendants" of a specified person, "as they may severally need." In all these cases the trusts were sup-

(c) See *Prestney v. Mayor, &c. of Colchester*, 21 Ch. D. 111, 119; 51 L. J. Ch. 805.

(d) *Supra*, p. 299.

(e) *Goodman v. Mayor, &c. of Saltash*, *supra*, p. 297.

(f) 7 Ves. 422.

(g) 3 M. & Cr. 559.

(h) 17 Ves. 371.

(i) 17 Ves. 373, note.

(k) *Att.-Gen. v. Duke of Northumberland*, 7 Ch. D. 745; 47 L. J. Ch. 569. See the observations of Jessel, M.R., in this case, upon a dictum of Wickens, V.-C., in *Gillam v. Taylor*, *infra*.

(l) L. R. 16 Eq. 581; 42 L. J. Ch. 674.

ported as being charitable. In *Liley v. Hey* (m) a gift of this character was held not to be charitable, but a gift to individuals, to be ascertained at the testator's death, for their lives, and after their deaths to other persons. But *Liley v. Hey* has not been followed, and is of doubtful authority (n).

But a gift to be enjoyed by successive generations of a particular family can only be upheld as a charity. If the gift is for *all* the family in perpetuity, irrespective of their being proper objects for charity, it will fail for remoteness. Thus, in a recent case, the gift was of a house, upon trust for the members of two families named in the will, as a residence; with a direction that it should not be mortgaged or sold. The gift was held void for perpetuity (o).

A gift for the purpose of keeping up tombs in a church-yard is not charitable, and is void for perpetuity. In some early cases gifts of this character were upheld (p), but there seems no doubt that the law is now settled as above stated. The last case upon the point is *In re Birkett* (q). There the bequest was to the incumbent of A., upon trust to apply the income of the fund, when necessary, in maintaining the grave, railing, and tombstone of B.; the residue of the income to be given to the sick poor of A. It was assumed by Jessel, M.R., that the gift for the tomb was invalid. In a series of recent cases it has been held that such is the law (r).

In *Fowler v. Fowler* (s) the gift was for keeping up graves, the surplus to go to the rector for the time being.

(m) 1 Ha. 580; 11 L. J. Ch. 415.

(n) See per Wickens, V.-C., L. R. 16 Eq. 584.

(o) *Yeap Cheah Neo v. Ong Cheng Neo*, L. R. 6 P. C. 381. See also *Hope v. Mayor, &c. of Gloucester*, and other cases cited below, p. 311.

(p) See *Doe d. Thompson v. Pitcher*, 3 M. & S. 407; 6 Taunt. 359; and cases cited Tudor's L. C. 3rd ed. 538.

(q) 9 Ch. D. 576; 47 L. J. Ch.

846.

(r) *Rickard v. Robson*, 31 Beav. 244; 31 L. J. Ch. 897; *Fowler v. Fowler*, 33 Beav. 616; 10 L. T. N. S. 682; *In re Williams*, 5 Ch. D. 735; 47 L. J. Ch. 92; *Fisk v. Att.-Gen.*, L. R. 4 Eq. 521; *Hoare v. Osborne*, L. R. 1 Eq. 585; 35 L. J. Ch. 345; *In re Rigley's Tr.*, 36 L. J. Ch. 147; *In re Birkett*, 9 Ch. D. 576; 47 L. J. Ch. 846.

(s) *Ubi supra*.

Chap. XVI. Lord Romilly held the whole gift void; as to the graves, for perpetuity; and as to the rector, for uncertainty. But it seems that such a gift would now be held to carry the whole fund to the rector. It was so held by Jessel, M.R., in *In re Birkett* (*ubi supra*).

Hoare v. Osborne (t) illustrates the difference between a gift to keep up a monument in a church and a similar gift for a grave or monument in a churchyard. The former is valid, the latter void for remoteness. In *Hoare v. Osborne* the gift was of money, to be applied in keeping in repair, (1) a vault in the churchyard, (2) a monument in the church, and (3) an ornamental window, to be placed in the chancel. It was held that the first object was not, and that the others were charitable. The gift for the vault, therefore, failed for perpetuity, and the others took effect. *In re Rigley's Trusts* (u) is a very similar case.

Disposition of land for a private burial place.

A disposition of land to be used for ever as a burial place for the testator's family would, it seems, be void. In the case of the will of a person domiciled in Penang, such a gift was held void for perpetuity (x). But under the Burial Acts (15 & 16 Vict. c. 85, and 16 & 17 Vict. c. 134) burial boards have power to grant the exclusive right of burial for ever in any part of a burial ground (y).

Trust for celebrating religious rites for the dead.

A gift for masses for the souls of the dead, or for the performance of any religious ceremonies over the dead, is not a charitable purpose. Such a gift, therefore, is void for perpetuity (z).

Gift to charity not void because the object specified is remote.

Provided the gift is immediate and the whole property is devoted to charity, the gift will not fail for remoteness merely because the particular purpose or application

(t) L. R. 1 Eq. 585; 35 L. J. Ch. 345.

(u) *Ubi supra*.

(x) *Yeap Cheah Neo v. Ong Cheng Neo*, L. R. 6 P. C. 381.

(y) See as to the nature of such

a perpetual right, *Matthews v. Jeffrey*, 6 Q. B. D. 290; 50 L. J. Q. B. 164.

(z) *West v. Shuttleworth*, 2 M. & K. 684; *Yeap Cheah Neo v. Ong Cheng Neo*, *ubi supra*.

directed by the will will not necessarily arise or become practicable within the limit of the Rule against Perpetuities. Thus a testatrix, after reciting her wish to give her property to charity, gave it upon trust "when and so soon as land shall at any time be given" for almshouses at A., to apply it in building the almshouses and maintaining the inmates. The gift was held to be an immediate gift to charity, and therefore valid (a). "The rules against perpetuity," said Lord Selborne, quoting the judgment of Lord Cottenham, in *Christ's Hospital v. Grainger* (b), "are to prevent, in cases to which they apply, property being inalienable beyond certain periods. But those rules do not apply to prevent pure personal estate from being given in perpetuity to charity; and when this has once been effectually done, it is, to use again Lord Cottenham's language, neither more nor less alienable because there is an indefinite suspense or abeyance of the actual application, or of its capability of being applied to the particular use for which it is destined. If the fund shall, either originally or in process of time, be or become greater in amount than is necessary for that purpose, or if strict compliance with the directions of the author of the trust should turn out to be impracticable, the Court has power to apply the surplus or the whole, as the case may be, to such other purposes as it may deem proper, upon what is called the *cy près* principle."

In *Christ's Hospital v. Grainger* (c) property was bequeathed to a corporation (A.), upon certain charitable trusts, with a proviso (d), that if the corporation failed for one year to apply the trust property in a proper manner, the property should be transferred to another corporation (B.) upon trust for the benefit of Christ's Hospital,

(a) *Chamberlayne v. Brockett*, L. R. 8 Ch. 206; 41 L. J. Ch. 789.

(b) 1 Mac. & Gord. 460; 1 H. & Tw. 533; 19 L. J. Ch. 33.

(c) *Ubi supra*.

(d) The original trusts had been varied by the Court, but the proviso was re-inserted.

Chap. XVI. a charitable institution. Corporation (A.) having misapplied the property for more than a year, it was held that corporation (B.) was entitled to call for a transfer. The Rule against Perpetuity did not, it was held, affect the validity of the proviso; for "the property was neither more nor less alienable" because of it.

In these cases the earlier case of *Attorney-General v. Bishop of Chester* (e) was followed. There the gift was of a small sum for the purpose of establishing a bishop in the American colonies. The sum being inadequate for the purpose of establishing a bishop, it was highly improbable that it would be possible within a reasonable period to apply it in the manner specified. The Court, nevertheless, directed that the fund should remain in Court, with liberty to apply if a bishop should be appointed.

In a recent case (f) the testatrix gave her residuary personal estate upon trust to be applied towards the endowment of an additional church at A., meaning a church to be built after her death. The gift was held valid, and an enquiry was directed whether the fund could be so applied. But Hatherley, C., expressed a doubt whether the Court would hold the fund for an indefinite time, until a church should be built.

In *Martin v. Margham* (g) the testator directed his residuary estate to be accumulated until it produced an income of a specified amount—an event which would not necessarily (or probably) occur within the legal period—and that the income should then be applied for the benefit of certain charity schools. It was held that there was a good gift of the residue to charity. "I conceive," said Shadwell, V.-C., "that if a testator has expressed his intention that his personal estate shall be, in substance, applied for charitable purposes, the particular mode which he may

(e) 1 Bro. C. C. 444.

(f) *Sinnett v. Herbert*, L. R. 7 Ch. 232; 41 L. J. Ch. 388.

(g) 14 Sim. 230; *nom. Martin v.*

Maugham, 13 L. J. Ch. 392.

have pointed out for affecting those purposes has nothing to do with the question whether the devotion for charitable purposes shall take place or not" (*h*).

But if the gift to charity is not immediate and absolute, if it is conditional upon a future and uncertain event, it is subject to the same rules, as regards remoteness, as other limitations. If the contingency is too remote, the gift is void. "Such a contingent gift, although for charity, having the effect of rendering the property inalienable during the whole continuance of the preceding non-charitable estates, must, in order to be valid, necessarily vest within the same limits of time as if the trustees had taken the residue (upon the same condition) for their own benefit, or for any other charitable objects" (*i*).

A gift to charity upon remote event is void.

In the *Commissioners of Charitable Donations v. De Clifford* (*k*) the testator gave the surplus rents (beyond a specified amount) of freeholds, which he had devised to trustees in trust for an almshouse, to the person or persons of the S. and C. families who, for the time being, should be lords of the manor of D.; with a gift over to the charity in case the families mentioned should not protect the charities, or if they should become extinct. It was held that the S. and C. families took the surplus rents in fee simple, and that the gift over was too remote.

So in *re Johnson's Trusts* (*l*) a gift of £10,000 to a charity upon an indefinite failure of issue of A. was held clearly void for remoteness.

It happens not unfrequently that an advowson is vested in trustees upon trust that they shall, from time to time, as vacancies occur, present to the living the nominee of the inhabitants of the parish. That such a trust is not void

Trust of advowson for the benefit of the inhabitants of the parish.

(*h*) In *Harbin v. Masterman*, L. R. 12 Eq. 559; 40 L. J. Ch. 760; the question was raised, but not decided, whether the *Thelluson* Act applies to a trust to accumulate for a particular charity.

(*i*) Per Selborne, C., in *Cham-*

berlayne v. Brockett, L. R. 8 Ch. 206, 211; 41 L. J. Ch. 789.

(*k*) 1 Dr. & W. 245.

(*l*) L. R. 2 Eq. 716; 12 Jur. N. S. 616. The charity does not appear to have been represented.

Chap. XVI. for perpetuity appears to be certain; though, so far as the writer is aware, the point has never been expressly decided. Upon what grounds its validity rests is not clear. There is no doubt that a limitation to an individual of an advowson must comply with the Rule against Perpetuities, like any other disposition of property (*m*); and there is difficulty in holding a trust such as that above described to be charitable (*n*). The better opinion seems, however, to be that such trusts are exempt from the Rule against Perpetuities as being, in a sense, charitable. The nature of these trusts is discussed by Jessel, M.R., incidentally, in *Attorney-General v. Webster* (*o*):—"Now it must be remembered that where the advowson is so held, the parishioners can get no individual profit; all they can get is the right to nominate their own rector or vicar—they get no personal benefit; and I think it is possible to reconcile that line of cases on this theory, that it is a mere mode of selecting the charity trustee, because the man who performs divine service and ministers to the spiritual wants of the parish is in a sense, and in a grand sense, a trustee for the parish. The parishioners, having the perpetual right of nomination, have only the right of choosing the parson of the parish, which is, no doubt, from its nature, a very important thing. At the same time I admit at once that it is an anomaly, and it is very difficult to find out how such a right of nomination could be properly vested in the parishioners from time to time, to elect at their own will and pleasure. However, it is so established" (*p*). This view of the reason for excepting such trusts from the operation of the Rule against Perpetuities is illustrated by the analogous exception which exists (*q*) in the case of the ordinary

(*m*) See *Proctor v. Bishop of Duth and Wells*, 2 H. Bl. 359.

(*n*) See Lewis on Perp. 694—709.

(*o*) L. R. 20 Eq. 483, 491; 44 L. J. Ch. 766.

(*p*) By many cases, of which *Shaw v. Thompson*, 3 Ch. D. 233; 45 L. J. Ch. 827, is one of the latest.

(*q*) See *supra*, p. 247.

power in a settlement of appointing new trustees, with its incidental power of revocation and new appointment.

In *Attorney-General v. Master of Brentwood School* (r) it was held that a perpetual right of nominating the master of a grammar-school, granted, by the charter of incorporation, to the founder and his heirs, was alienable. Such a right, therefore, like an advowson, is property, and can be exercised by an alienee; and it is not objectionable on the ground of perpetuity.

The attempt has sometimes been made by a direction in a will, or a covenant in a conveyance, creating a charitable trust, to confer on the testator's or settlor's kindred a perpetual right or interest in the property given to charity. Such attempts have invariably failed.

Gift to charity with reservation or disposition of part of the property for the benefit of donor's kindred.

By an Indenture dated in 1539, conveying lands to a municipal corporation for charitable purposes, the corporation covenanted, for themselves and their successors, that if any of the heirs of the body of a person named in the deed, being of consanguinity and kindred of the grantor, should come claim and make lawful request to the mayor and burgesses for the time being to have a new lease to him or her, to be made within a year of the existing lease falling in, then and so often as such request should be made, the mayor and burgesses for the time being would make a new lease to him or her for thirty-one years at the yearly rent of twenty marks (s). It was held that the covenant was invalid as creating a perpetuity. Knight Bruce, L.J., spoke of the covenant as "a provision which directly tends to create, and if valid does create, a perpetuity, such as the principles and rules of the English law did before and throughout the reign of King Henry VIII. prohibit, have ever since forbidden, and do now forbid."

(r) 3 B. & Ad. 59.

(s) *Hope v. Mayor, Aldermen and Citizens of the City of Gloucester*,

7 D. M. & G. 647; 25 L. J. Ch. 145.

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In *Attorney-General v. Greenhill* (t) the testator devised lands to two colleges for charitable purposes, and directed that part of the lands should be leased to his wife's kindred for ever at one-third part under its true value. It was held that the direction to lease was void for perpetuity, and that the colleges could lease to whom they pleased.

In *Attorney-General v. The Master of Catharine Hall* (u) a direction not to raise the rents was held void as inconsistent with the devise of the lands to the college.

Charitable trusts valid in British colonies.

Statutes of Mortmain.

The Rule against Perpetuities being part of the law in force in British colonies, is subject in the colonies to the same exception in favour of charity as in England (x).

Although the Rule against Perpetuities is relaxed in favour of charities, gifts of land to charitable and other corporations, whereby it becomes inalienable, have been restrained by the legislature from very early times. From Magna Charta to the Statute of Mortmain (9 Geo. II. c. 39, entitled, "An Act to restrain the disposition of lands whereby the same become unalienable") a succession of Acts have been passed dealing with the subject. The operation of these Acts is not within the scope of the present work. Their policy has varied with the times which produced them (y). The earlier of them were passed in the interest, not of the public, but of the lords who were deprived of their rights of escheat, and other feudal profits, by alienations to ecclesiastical houses having perpetual existence. The last mentioned Act was passed with two objects—first, to prevent the locking up of land and real property from being aliened, which is made the title of the Act; secondly, to prevent persons in their last moments from being imposed on to give away their

(t) 33 Beav. 193; 33 L. J. Ch. 394.
208.

(u) Jacob, 381.

(x) *Neo v. Neo*, L. R. 6 P. C. 381,

(y) For an account of the laws prohibiting alienation in mortmain see 2 Blackst. Con m. 268, seq.

real estates from their families (z). The policy of this Act, Chap. XVI. therefore, as well as of the other Acts now in force prohibiting corporations from holding lands without a license in mortmain (a), is, at least in part, the same as that of the Rule against Perpetuities—"to prevent the locking up of land and real property from being aliened."

(z) Per Hardwicke, C. (in *Att.-Gen. v. Day*, 1 Ves. sen. 218, 223), who was Lord Chief Justice of the King's Bench when the Act was passed.

(a) See 7 & 8 Will. III. c. 37; and as to limited companies for charitable purposes, 25 & 26 Vict. c. 89, s. 21.

CHAPTER XVII.

ACCUMULATION.

Chap. XVII. PRIOR to the passing of the Thelluson Act, hereafter mentioned, the only limit to the duration of a trust for accumulation (a) of income of real or personal property was that imposed by the Rule against Perpetuities on the vesting of limitations. A trust to accumulate income for a life or lives in being and twenty-one years afterwards, and, in addition, for the period of gestation, where gestation existed, was valid for the whole of the period named (b). And as to trusts declared before the 28th of July, 1800, this is still the law. Trusts declared since that date are subject to the Act above mentioned, which places further limits on the period during which accumulation may be directed.

Before the Thelluson Act, a trust for accumulation during the whole of the period allowed for the vesting of limitations was valid.

Trust for accumulation beyond that period is wholly void.

A trust for accumulation beyond the period above mentioned, whether declared before or after the Thelluson Act, is altogether void for remoteness.

In *Lord Southampton v. Marquis of Hertford* (c) lands were settled, subject to a term, in strict settlement. The trusts of the term were that the trustees should, during the minority of any tenant for life or in tail under the settlement, receive and accumulate the rents, and hold

(a) A trust for accumulation affects the income of the property subject to the trust, and then again the income of that income when invested; see *Green v. Gascoyne*, 24

L. J. Ch. 268; 4 D. J. & S. 565.

(b) See per Lord Eldon, *Griffiths v. Vere*, 9 Ves. 127; *Thelluson v. Woodford*, 4 Ves. 227; 11 Ves. 112

(c) 2 V. & B. 54.

the accumulations in trust for the person who, upon the expiration of the minority, or upon the death of the minor, should be entitled to the rents and should be of the age of twenty-one years. The trust was held void for remoteness. In *Marshall v. Holloway (d)* the trust was, to accumulate the income of real and personal property limited by the will in strict settlement as often as any person entitled under the limitations should be under the age of twenty-one. The trust was, by Lord Eldon, held to be wholly void for perpetuity.

Although accumulation such as that directed in *Marshall v. Holloway* during minorities of tenants in tail by descent as well as by purchase cannot be directed and take effect under the terms of a trust, the same accumulation may take place by operation of law in the ordinary course of administration, or under the provisions of 44 & 45 Vict. c. 41, s. 42.

The two cases above mentioned show that a trust to accumulate during minorities of all the tenants in tail under a strict settlement cannot be "split," so as to be good as to minorities of tenants for life and tenants in tail by purchase (which must necessarily occur within the legal period), and as to the rest, void for remoteness.

Generally speaking, a trust for accumulation, which is to endure beyond the legal period, is altogether void, whatever may be the object of the accumulation, and whatever the destination of the accumulated fund. There are, however, certain exceptions. Accumulation for charity; for the purpose of paying off the testator's or settlor's debts; for raising a sum already existing as a charge upon the property; for raising a sum charged upon the property by the instrument creating the trust; a trust to accumulate rents of settled realty which is barrable by the tenant of a prior estate tail; and, generally, trusts for

Exceptions from the general rule as to the invalidity of a trust to accumulate beyond the legal period.

(d) 2 Sw. 432. The trust in this case was by Lord Eldon (p. 448) described as a "dancing" trust for accumulation.

Chap. XVII. accumulation which can necessarily be put an end to within the legal period by the person or persons entitled to the property subject to the trust, are untouched by the Rule against Perpetuities.

Accumulation
for charity.

First, as to a trust to accumulate income of property devoted to charity. Where there is a clear gift of the whole property to charity, a direction to accumulate the income beyond the line of perpetuity for a particular charitable purpose, though it will not be carried out by the Court, will not invalidate the gift (*e*).

Accumulation
for payment of
debts.

A trust for accumulation for payment of the testator's or settlor's debts is not within the scope of the Rule against Perpetuities. Subject to the right of the creditors to obtain payment of their debts out of the corpus, such a trust may be directed, and may continue, for an indefinite period.

In *Bateman v. Hotchkin* (*f*) the testator devised real estate in strict settlement, subject to a term of 2000 years, which was limited to trustees upon trust to raise every year £500, to be invested and accumulated as a sinking fund for payment of his (the testator's) debts, and for payment of charges created by the will. It was held by Lord Langdale, M.R., that the trust, though unlimited in its duration, was valid. The grounds of the decision were (1) that the first tenant in tail attaining twenty-one would obtain absolute dominion over the property, subject to the debts and charges; (2) that, on that event taking place, the trustees of the term would become trustees for the owner of the estate, who might deal with the term and with the estate at his own discretion, subject only to the debts and charges. Without the consent of the owner of the estate the trust for accumulation could not continue

(*e*) *Martin v. Margham*, 14 Sim. 230; *nom. Martin v. Maugham*, 13 L. J. Ch. 392; and see *Sinnett v. Herbert*, L. R. 7 Ch. 232; 41

L. J. Ch. 388, *supra*, p. 308.

(*f*) 10 Beav. 426; 16 L. J. Ch. 514.

beyond the time during which the law permits the suspension of full power over the estate. Chap. XVII.

Bateman v. Hotchkin followed the previous case of *Bacon v. Procter* (g). It has been followed in the subsequent cases of *Briggs v. Earl of Oxford* (h) and *Tewart v. Lawson* (i).

A trust to accumulate for payment of debts comes to an end when the debts are paid, whether by means of the accumulated fund, or otherwise (k). A trust to accumulate for payment of debts, or, if the debts are otherwise paid, until the sum which would have been required for their payment is reached, would be void for remoteness (l).

A direction to accumulate until a certain sum is produced, which will not necessarily be reached within the period allowed by the Rule against Perpetuities, is not, it seems, void for remoteness, provided the limitation of the sum accumulated must vest within that period (m). "Suppose that a fund was directed to be accumulated simply for the benefit of a particular individual, until a certain amount was reached, which might not be reached within the period allowed by law for suspension of vesting, it surely could not be said that the disposition was void for remoteness, when the individual might, at any time, stop the accumulation and dispose of the fund" (n).

So in *Tregonwell v. Sydenham* (o) a term was created for the purpose of raising £20,000 to be laid out in the purchase of lands, to be settled to uses which, in the event, proved too remote. It was held that the term was well created, and that the trust for raising the £20,000 and purchasing lands was valid, though the uses to which the lands were to be conveyed were too remote.

(g) T. & R. 31.
 (h) 1 D. M. & G. 363; 21 L. J. Ch. 329; *supra*, p. 158.
 (i) L. R. 18 Eq. 490; 22 W. R. 822.
 (k) *Tewart v. Lawson*, *ubi supra*.

(l) *Tewart v. Lawson*, *ubi supra*.
 (m) *Oddie v. Brown*, 4 De G. & J. 179; 23 L. J. Ch. 542.
 (n) Per Turner, L.J., 4 De G. & J. 196.
 (o) 3 Dow. 194.

Accumulation for raising charges created by the instrument declaring the trust.

Chap. XVII.

In *Williams v. Lewis* (p) the testator gave leaseholds to trustees upon trust for thirty years to accumulate the rents and pay the legacies bequeathed by his will. One legacy only, of £600, was bequeathed to a person in existence to be paid at her age of twenty-one. It was held that the trust to accumulate was not void for remoteness. "It seems to me that this (the trust of the thirty years term) amounts to nothing more than a charge of £600; and the term which is secured for its payment, either by rents and profits or by accumulation of rents, I cannot consider in the slightest degree tends to perpetuity" (q).

Trust for accumulation liable to be put a stop to by the owner of the property.

So a trust for accumulation is not void, either by the Rule against Perpetuities, or by the Thelluson Act, where within the legal period there will certainly be a person or persons entitled to put a stop to the accumulation and call for a transfer of the property. Thus, in *Phipps v. Kelynge* (r) there was a bequest of leaseholds upon trusts to lay out the rents from time to time in the purchase of lands to be settled upon A. for life, with remainder to B. in tail, with remainders over; and a direction that, until proper purchases could be made, the money should be invested and income paid to the persons who would have been entitled to the rents of the purchased land. Since the leaseholds, in such a case, vest absolutely in the first tenant in tail, he and the tenant for life can together call for an assignment and stop the accumulation (s).

Trust to accumulate until an executory limitation vests.

In the case of an executory limitation of real or personal property taking effect within the line of perpetuity, a trust to accumulate rents and profits or income until the limitation vests will not be obnoxious to the Rule against Perpetuities. For *ex hypothesi* it must come to an end within the line of perpetuity. In the case of a residuary bequest of personal property, accumulation will, in the

(p) 6 H. L. C. 1013; 28 L. J. Ch. 505.

(r) 2 V. & B. 57, note, b.

(q) Per Lord Wensleydale, 6 H. L. C. 1025.

(s) See observations of Sir W. Grant, M.R., 2 V. & B. 62, 63.

absence of an express trust, take place by operation of law, for the benefit of the person who takes under the executory limitation. But it will be seen hereafter that such a trust, express or implied, though it cannot be wholly void by the Rule against Perpetuities, may be void in part under the provisions of the Thelluson Act (t).

A direction to accumulate income after the property has vested, and, at the expiration of the time named for accumulation, to transfer the accumulations and the property to the *cestui que trust*, is simply nugatory. The *cestui que trust*, having attained twenty-one, can at once stop the accumulation and call for a transfer of the property (u). To such a trust the Rule against Perpetuities, obviously, has no application.

Trust to accumulate after the property has vested.

A trust to accumulate rents of settled real estate is not void for remoteness if, in order of limitation, it is subsequent to the estate of a tenant in tail who takes by purchase. Like other limitations barrable by a tenant in tail, it is excepted from the operation of the Rule against Perpetuities. But a trust for accumulation during successive minorities of tenants in tail under a strict settlement, which trust is attached to an estate limited to the trustees, either expressly or by implication, in priority to the estate tail, is void for remoteness, unless it is expressly restricted to the minorities of tenants in tail taking by purchase. Such a trust, though barrable, as regards its prospective operation, by the first tenant in tail, is not barrable as regards the minority of the tenant in tail who disentails. Notwithstanding *Briggs v. Earl of Oxford* (x), and the *dicta* of Knight Bruce, L.J., in that case, such appears to be the effect of the decisions in *Browne v.*

Trust to accumulate rents of settled real estate during minorities

(t) See *infra*, p. 329; and *Bective v. Hodgson*, 10 H. L. C. 656; 33 L. J. Ch. 601.

(u) *Saunders v. Fautier*, 10 L. J. Ch. 354; 1 Cr. & Ph. 240; *Corentry v. Coventry*, 2 Dr. & Sm. 470; 13

W. R. 985; *Gosling v. Gosling*, Johns. 265; 5 Jur. 910; *Hilton v. Hilton*, L. R. 14 Eq. 468, 475.

(x) 1 D. M. & G. 363; 21 L. J. Ch. 829.

Chap. XVII. *Stoughton (y) and Turvin v. Newcombe (z).* This subject is fully discussed elsewhere in connection with the application of the Rule against Perpetuities to limitations taking effect after or collateral to estates tail (a).

The Thelluson
Act 39 & 40
Geo. III. c. 98.

The duration of trusts for accumulation of income (except certain trusts for payment of debts, raising portions, and with regard to timber) is now regulated by the statute 39 & 40 Geo III. c. 98, commonly called the Thelluson or Lord Loughborough's Act (b). It applies to wills and other instruments taking effect after the 28th of July, 1800. The Act was passed in consequence of the serious evils arising from the state of the law which permitted the accumulation directed by the will of Mr. Peter Thelluson (c).

Thelluson v.
Woodford.

The testator, Peter Thelluson, who died in 1797, devised his real and personal estate to trustees, in trust to invest his personal estate in the purchase of lands, and, as to the lands so purchased and also as to the testator's real estate, upon trust during the lives of his three sons, A., B., and C., and of his grandson D. (son of A.), and of such future sons of A., and of such issue of D., and of such issue of future sons of A., and of such future sons of B. and C., and of such issue of future sons of B. and C., as should be living at his death or born in due time afterwards, and during the lives and life of the survivors and survivor of them, to receive and collect the rents and profits, and invest them in the purchase of real estate; and, as to the real estate so purchased, upon trust to receive, collect, and invest, the rents in like manner. And upon the death of the survivor of the persons before mentioned the testator directed the estates devised and directed to be purchased

(y) 14 Sim. 369; 15 L. J. Ch. 291.

(z) 3 K. & J. 16; 3 Jur. N. S. 213.

(a) *Supra*, pp. 156—160; and see 2 Jarm. on Wills, 4th ed. 274.

(b) The facts relating to Mr.

Thelluson's Will, the circumstances under which the Act was passed, and its policy, are discussed in Mr. Hargreave's Treatise on the Thelluson Act.

(c) *Thelluson v. Woodford*, 4 Ves. 227; 11 Ves. 112; 1 N. R. 357.

to be divided into three lots ; “ and that the premises contained in one such lot shall be conveyed to the eldest male lineal descendant then living of my said son A.” in tail male, with remainders in tail male to other descendants of A., successively, and ultimately, in moieties, to the respective future male descendants of B. and C., and with cross remainders between them. There were directions for similar settlements of the other two lots in favour of descendants of B. and C. ; and upon a general failure of issue male entitled or inheritable under the entails, the testator directed all the real and personal estate of which the trust property should then consist to be converted into money, which he bequeathed towards payment of the National Debt. And he directed that the trust moneys should be invested upon real or government securities until suitable purchases could be found and sufficient sums accumulated to make purchases ; the income of such investments to be accumulated in like manner and for the same purposes as before mentioned with regard to rents and profits of the lands.

The validity of these trusts was contested by the testator's heir at law and next of kin. Lord Chancellor Loughborough, in 1798, held the trusts to be valid ; and his decree was, in 1805, affirmed by the House of Lords, in accordance with the unanimous opinion of the judges. The property comprised in this will consisted of land of the yearly value of from £4000 to £5000, and personalty amounting to upwards of half a million sterling. The probable amount of the accumulated fund was variously estimated at from £19,000,000 to £23,000,000, without taking into account a possible minority at the end of the term (*d*). In the event of such a minority, the accumulated fund would be much larger.

(*d*) See Hargreaves on the Thelluson Act, pp. 7, 67.

Chap. XVII. It was in consequence of this will that the Thelluson Act was passed. The Act is as follows :—

39 & 40 Geo. III. c. 98. *An Act to restrain all trusts and directions in deeds or wills whereby the profits or produce of real or personal estate shall be accumulated and the beneficial enjoyment thereof postponed beyond the time therein limited.*

[28th July, 1800.]

Whereas it is expedient that all dispositions of real or personal estates whereby the profits and produce thereof are directed to be accumulated and the beneficial enjoyment thereof is postponed should be made subject to the restrictions hereinafter contained : May it therefore please your Majesty that it may be enacted, and be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in Parliament assembled, and by the authority of the same, That no person or persons shall, after the passing of this Act, by any deed or deeds, surrender or surrenders, will, codicil, or otherwise howsoever, settle or dispose of any real or personal property so and in such manner that the rents, issues, profits or produce thereof, shall be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settler or settlers, or the term of twenty-one years from the death of any such grantor, settler, deviser or testator, or during the minority or respective minorities of any person or persons who shall be living or in *ventre sa mere* at the time of the death of such grantor, deviser or testator, or during the minority or respective minorities only of any person or persons who, under the uses or trusts of the deed, surrender, will or other assurances directing such accumulations, would, for the time being, if of full age be entitled unto the rents, issues and profits, or the interest, dividends or annual produce so directed to be accumulated ; and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits, and produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received

No person, by deed or will, &c., shall settle or dispose of any real or personal property in such manner that the rents or produce shall be accumulated for a longer term than herein mentioned, and any other direction shall be void, and the rents go to the person entitled thereto.

by such person or persons as would have been entitled thereto, if such accumulation had not been directed. Chap. XVII.

II. Provided always, and be it enacted that nothing in this Act contained shall extend to any provision for payment of debts of any grantor, settler or deviser, or other person or persons, or to any provision for raising portions for any child or children of any grantor, settler, or deviser, or any child or children of any person taking any interest under any such conveyance, settlement, or devise, or to any direction touching the produce of timber or wood upon any lands or tenements, but that all such provisions and directions shall and may be made and given as if this Act had not passed.

Nothing herein to extend to any provision for payment of debts, or for raising portions for children, or touching the produce of timber.

III. Provided also, and be it enacted that nothing in this Act contained shall extend to any disposition respecting heretable property within that part of Great Britain called Scotland (e).

Nor to any disposition of heretable property in Scotland.

IV. Provided also, and be it enacted that the restrictions in this Act contained shall take effect and be in force with respect to wills and testaments made and executed before the passing of this Act, in such cases only where the deviser or testator shall be living and of sound and disposing mind after the expiration of twelve calendar months from the passing of this Act.

When restrictions shall take effect with respect to wills made before the passing of this Act.

The draughtmanship of this Act has been often severely criticised (f). Shortly after its passing the question arose whether a trust for accumulation which transgressed the Act was altogether void, or whether it took effect during the period allowed by the Act, and failed only as to the excess. It was held that the Act took effect in the manner last stated. In *Griffiths v. Vere* (g) there was a trust to pay the income of property to two sisters for their lives, and to the survivor during her life, with a proviso that, during the life of the husband of one of them, her share of the income should be accumulated, and the accumulations paid to her on the husband's death; or, if she

Trust infringing the Act good *pro tanto*.

(e) This section is repealed, see *infra*, p. 334.

(f) "One of the most ill-drawn Acts to be found in our Statute Book," per Lord Cranworth, *Tench*

v. Cheese, 6 D. M. & G. 460; 24 L. J. Ch. 716; see also 1 M. & Cr. 141; 3 Beav. 596; 3 D. M. & G. 55.

(g) 9 Ves. 127.

Chap. XVII. were then dead, otherwise dealt with as in the will mentioned. It was held that, in execution of the trust, the income must be accumulated for twenty-one years from the testatrix' death, when the accumulation was to cease; and that the Act had no operation to stop accumulation until the expiration of the twenty-one years.

We have seen that a limitation which infringes the Rule against Perpetuities is altogether void. *Griffiths v. Vere* decides that a limitation contrary to the Thelluson Act may take effect so far as it does not sin against the Act. The different effect of the statute and the Rule against Perpetuities in this respect is explained by Sir W. Grant:—"The Act introduced a restriction on a liberty antecedently enjoyed, and therefore it was only to the extent of the excess that the prohibition was transgressed. Whereas executory devise is itself an infringement of common law, and is allowed only on condition of its not exceeding certain established limits. If the condition is violated, the whole devise is held to be void" (*h*). And in *Marshall v. Holloway* (*i*) Lord Eldon thus states the effect of the Act:—"The true doctrine seems to be that of a trust for accumulation which, prior to Lord Loughborough's Act, would have been good, so much as is now within the Act will be good; but the excess will be bad. But if there be a trust for accumulation, and part of it would have been bad before the Act, that part remains bad notwithstanding the Act." The interpretation of the Act adopted in *Griffiths v. Vere* has been followed in all subsequent cases (*k*).

(*h*) *Leake v. Robinson*, 2 Mer. 363, 389.

(*i*) 2 Swanst. 432, 450.

(*k*) The cases in which a trust for accumulation has been held good in part, and void only as to the excess, are very numerous. Amongst them are the following: *Longdon v. Simson*, 12 Ves. 295; *Haley v. Bannister*, 4 Mad. 275; *Crawley v.*

Crawley, 7 Sim. 427; 4 L. J. Ch. 265; *O'Neil v. Lucas*, 2 Keen, 313; *Eyre v. Marsden*, 2 Keen, 564; 4 M. & Cr. 431; 7 L. J. Ch. 220; *Ellis v. Maxwell*, 3 Beav. 135; 12 Beav. 104; 10 L. J. Ch. 363; *Shaw v. Rhodes*, 1 M. & Cr. 135; on app. *nom. Oddie v. Brown*, 4 De G. & J. 179; 28 L. J. Ch. 542.

The object of the Act was to shorten the period during which accumulation might be legally directed and take effect, not to legalise any disposition which, apart from the Act, is void for perpetuity. A trust, therefore, for accumulation which infringes the Rule against Perpetuities is altogether void, and cannot take effect, even during the period for which the Act allows accumulation (*l*). Thus, in *Marshall v. Holloway* (*m*), in the will of a testator who died in 1816, there was a direction to accumulate during the minorities of all or any of the persons entitled to certain property under the limitations of the will. The limitations were of real and personal property in favour of an infant for life, with remainders to his sons successively in tail, with remainder over. It was held by Lord Eldon that the trust for accumulation was altogether void.

A trust to accumulate affects the interest of the principal sums invested, and then again the interest on that interest (*n*). But the Act applies to all trusts for accumulation, whether by way of simple or compound interest. A trust to set apart out of income so much as, in a given number of years, will amount to a specified sum is within the Act (*o*).

The operation of the Act is not confined to cases where accumulation is directed in terms. The Act applies wherever the limitation of the property, or the trust of income, is such that it cannot take effect, or be executed, without accumulation taking place. In *Longdon v. Simson* (*p*) the direction was that the profits of certain canal shares should be invested. In *Shaw v. Rhodes* (*q*) the testator

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Trust to accumulate beyond the line of perpetuity altogether void, notwithstanding the Act.

Trust to accumulate at simple or at compound interest is within the Act.

The Act applies where the accumulation is by operation of law, as well as where it is in terms directed.

(*l*) *Boughton v. James*, 1 Coll. 26, 45; 1 H. L. C. 406; and see *Browne v. Stoughton*, 15 L. J. Ch. 391; 14 Sim. 369; *Lord Southampton v. Hertford*, 2 V. & B. 54; *Scarisbrick v. Skelmersdale*, 17 Sim. 187; 19 L. J. Ch. 126.

(*m*) 2 Swaust. 450.

(*n*) Per Westbury, C., *Green v.*

Gascoyne, 34 L. J. Ch. 268; 4 D. J. & S. 565.

(*o*) *Evans v. Hellier*, 5 C. & F. 114.

(*p*) 12 Ves. 295.

(*q*) 1 M. & Cr. 135, 144; on app. *nom.* *Evans v. Hellier*, 5 Cl. & F. 114.

Chap. XVII. "charged" his estates with a sum of £30,000, to be raised out of part of the produce or income of the estates. In *Matthews v. Keble* (r) the testator directed his trustees to apply so much as necessary of the income of his residuary personal estate towards the maintenance of his son, a lunatic, during his life, and to invest any surplus and treat it as part of his personal estate. In all these cases it was held that there was a direction to accumulate within the meaning of the Act.

There is some doubt as to the effect of the Act where there is no direction to accumulate either in express terms, or, as in *Matthews v. Keble*, by way of trust for investment of income. The question arises principally with reference to executory bequests of residuary personalty in this way. If a freehold is given by way of executory devise, there is no disposition of the property till that estate arises and becomes vested; consequently the freehold in the meantime descends to the heir-at-law. This is because of the rule of law that the freehold cannot remain in abeyance. But that rule has no application to a bequest of personal estate. And if the whole, or the residue, or part of the residue, of a testator's personal estate is the subject of an executory bequest, the income follows the principal as an accessory, and must be accumulated and added to the principal (s). The question is whether the Thelluson Act prevents accumulation beyond the period mentioned in the Act in the case of an executory gift that does not take effect within that period. The better opinion is that the Act applies in such cases, and consequently that accumulation will cease at the end of twenty-one years from the testator's death. If a man by his will makes such a disposition of his property, that there will necessarily be

(r) L. R. 4 Eq. 467; 3 Ch. 691; W. 300; *Earl of Bective v. Hodgson*, 10 H. L. C. 656; 33 L. J. Ch. 37 L. J. Ch. 8, 657.
 (s) *Studholme v. Hodgson*, 3 P. 601.

an indefinite accumulation, he must be held to have directed such accumulation. "The leaning of my opinion is that if I had to decide the point, I should hold that if a testator directs his property to go in such a course that upon certain contingencies there must be accumulation beyond twenty-one years, he does direct that upon those contingencies the accumulation shall take place beyond that time" (t). And in *Macpherson v. Stewart* (u) Kindersley, V.-C., said :—"Although a testator may not in terms direct accumulation, still, if he gives such directions as make investments and accumulations necessary, the Act applies."

In *Tench v. Cheese* (ubi supra) the testator gave real and personal estate to trustees upon trust to pay out of the income an annuity to S., and, subject thereto, upon trust to raise thereout £4000 for the younger children of S., if she should have any. The "net residue and remainder" of his property, together with the accumulations of income, which he directed his trustees to invest, he gave upon trust for the eldest son of S. at twenty-one, he taking the testator's name; and if there should be no son or daughter of S., then upon trust for T. at twenty-five, he taking the testator's name. At the end of twenty-one years from the testator's death there was living no child of S. It was held by Lord Cranworth, C., and Turner, L.J., that the will contained a direction to accumulate within the meaning of the Act (x). This case, therefore, is not decisive of the question under consideration, for Turner and Knight Bruce, L.J.J., were doubtful as to the effect of the Act, where the will contains no clear direction to accumulate, and accumulation takes place only by operation of law. And from the judgment of Lord Cranworth it appears that

(t) Per Lord Cranworth in *Tench v. Cheese*, 6 D. M. & G. 453, 462. This passage was cited with approval by Wood, L.J., in *Matthews*

v. Keble, L. R. 3 Ch. 691, 696; 37 L. J. Ch. 657.

(u) 28 L. J. Ch. 177.

(x) 19 Beav. 3.

Chap. XVII. he did not consider that the case raised the question as to accumulation by operation of law.

In *Morgan v. Morgan* (y) there was a bequest of £5000 "with all accumulations of income thereon from the time of my death" to a spinster upon her marriage. It was held that accumulation beyond twenty-one years from the testator's death was contrary to the Act.

In *Macdonald v. Bryce* (z) the gift was of the testator's residuary estate, which consisted wholly of personalty, (in effect) to the first son of A. who should attain twenty-one. No son having attained twenty-one at the expiration of twenty-one years from the testator's death, Lord Langdale held that the Act applied, and that accumulation must then cease.

In the *Earl of Bective v. Hodgson* (a) the testator devised lands by way of executory devise to take effect after the death of his daughter. He bequeathed two-thirds of his residuary personal estate upon trust to be invested in the purchase of real estate to be settled to uses to which the lands were devised. It was held (b) that the income of two-thirds of the personalty should be accumulated and laid out in the purchase of lands, as directed by the will, until the expiration of twenty-one years from the testator's death, or until the executory devise took effect, whichever should first happen.

In *Elborne v. Goode* (c) Sir L. Shadwell, V.-C., dissented from *Macdonald v. Bryce*, and shortly afterwards, in *The Corporation of Bridgnorth v. Collins* (d), he held that the Act does not apply where the will contains no specific direction to accumulate, and where accumulation results, not from any direction given by the testator, but "by

(y) 4 De G. & Sm. 164; 20 L. J. Ch. 109, 441.

(z) 2 Keen, 276; 7 L. J. Ch. 173.

(a) *Nom. Hodgson v. Earl Bective*, 1 H. & M. 376; on app. 10 H. L. Ch. 656; see also *Wade Gery v. Handley*, 1 Ch. D. 653; 3 Ch. D.

374.

(b) By the House of Lords, counsel on both sides assenting.

(c) 14 Sim. 165, 174; 13 L. J. Ch. 394. See also *Lombe v. Stoughton*, 12 Sim. 304.

(d) 15 Sim. 538.

chance." The testator there directed part of the income of a trust fund to be paid to certain persons for their lives, and on the death of the survivor the fund was to be sold, and the proceeds, together with accumulations of income, he gave to a class to be then ascertained. Sir L. Shadwell held that the Act did not apply to accumulations which had been made between the expiration of twenty-one years from the testator's death and the death of the surviving annuitant. "It may be true," he said, "that there has been an accumulation, but it is the result, not of any direction given by the testator, but of chance; and I think that the Act does not apply to an accidental accumulation."

Sir J. Stuart also, in *Matthews v. Keble* (e), expressed doubts as to the decisions in *Macdonald v. Bryce* and *Bective v. Hodgson*, in both of which cases he states that the point in question was decided without argument. From recent cases, however, it appears that these doubts were not well founded, and that the law is as stated in *Tench v. Cheese*.

In *Ralph v. Carrick* (f) there was a gift of real and personal estate to a class to be ascertained at the death of the testator's widow, with no direction as to the application of part of the income during the widow's life. Hall, V.-C., held that the income must be accumulated for the benefit of the class for twenty-one years from the testator's death, and that then accumulation must stop.

In *Weatherall v. Thornburgh* (g) the testator gave the income of his real and personal estate to his wife during her widowhood, and after her marriage he directed the trustees to pay her an annuity, and invest the residue of

(e) L. R. 4 Eq. 467, 472.

(f) 5 Ch. D. 984; 11 Ch. D. 873; 40 L. T. N. S. 505. It does not appear from the report that the question as to the application of the Act was argued either before the

Vice-Chancellor or the Court of Appeal.

(g) 8 Ch. D. 261; 47 L. J. Ch. 658. See also *Harbin v. Masterman*, L. R. 12 Eq. 559; 40 L. J. Ch. 760.

Chap. XVII. the income. Upon the wife's death he directed certain legacies to be paid out of the trust estate and the accumulations, and subject thereto he gave the whole to A. It was held that upon the widow's second marriage the surplus income should be accumulated during her life until the expiration of twenty-one years from the testator's death, and that then the accumulation must stop.

In *Matthews v. Keble* (*h*) Page Wood, L.J., points out that the opinion expressed by Lord Eldon, in *Griffiths v. Vere*, that notwithstanding the Act, accumulation may in a case of infancy continue for more than twenty-one years, has no reference to cases where infancy does not exist, and where accumulation is in consequence of the limitations of the will. In the case of infancy "the Court," he says, "is managing the infant's property, and it is simply the circumstance of the law not allowing infants to dispose of their property that occasions any accumulation" (*i*). And in *Bryan v. Collins* (*k*) Romilly, M.R., points out the essential distinction between accumulation by operation of law and accumulation by virtue of a direction contained in the will. In the former case the accumulations may be applied towards maintenance of the infant; in the latter they cannot be touched until the infant attains twenty-one (*l*).

Trust to accumulate so long as the law permits.

Where accumulation is directed during a period which may exceed that allowed by the Act or so long as "the rules of law permit," the accumulation will continue during the statutory period, and then cease. In *Talbot v. Jevers* (*m*) the testator directed the surplus income of his estate, after providing for annuities, to be accumulated

(*h*) L. R. 3 Ch. 691.

(*i*) L. R. 3 Ch. 691, 996.

(*k*) 16 Beav. 14, 18

(*l*) But see now 44 & 45 Vict. c. 41, s. 43. *Qu.* Would not an express direction to accumulate be a "contrary intention" within sub-s. (3)?

(*m*) L. R. 20 Eq. 255; 44 L. J. Ch. 646. In *Westcar v. Westcar*, 21 Beav. 328; 25 L. J. Ch. 866; the trust to accumulate was to continue "so long as the same can lawfully operate." Cf. *Patching v. Barnett*, 49 L. J. Ch. 665; 51 L. J. Ch. 74.

until the death of the surviving annuitant "or during such portion of such surviving annuitant's life as the rules of law will permit"; and on the death of the surviving annuitant the whole of the trust estate and accumulations were to be applied in the purchase of land to be conveyed to the testator's nephew. It was held that the accumulation must cease at the end of twenty-one years from the testator's death. Chap. XVII.

Where there are alternative executory bequests, the second to take effect if the first fails, if the event upon which the second depends occurs within the statutory period for accumulation, and that upon which the first depends remains contingent until the statutory period has expired, and then becomes impossible, it has been held that accumulation in favour of the donee under the second bequest continues until the occurrence of the event upon which the bequest depends, and then ceases. A fund was given upon trust to accumulate the income, and upon trust as to the capital and accumulations for the eldest daughter of A., payable at twenty-one or marriage; and, if no such daughter, for the eldest daughter of B., payable in like manner. B. had a daughter, G., born after the testator's death, who died an infant. Afterwards A. died without ever having had a child. It was held by Romilly, M. R., that G.'s representatives were entitled to the legacy and to the accumulations up to G.'s death, together with simple interest at 4 per cent. on the whole from that date to the time of payment. The Master of the Rolls appears to have held that the statute had no operation in the case (*n*). Accumulation in case of alternative executory bequests.

Where accumulation takes place, not under any specific direction or as a necessary consequence of the limitations, but incidentally in execution of the trusts, or in consequence of a breach of trust, it appears that the Act does Accidental accumulation.

(*n*) *Bryan v. Collins*, 16 Beav. 14; *gan, supra*, p. 328.
the M. R. followed *Morgan v. Mor-*

Chap. XVII. not apply. In *Lomb v. Stoughton* (o) the testator directed that, in certain events, his trustees should erect a mansion house according to plans to be approved by the tenant for life of certain lands which he devised in settlement; and he bequeathed to them £20,000 for that purpose, and in the meantime to be invested and the income accumulated by way of compound interest—the accumulations to be applied in the same manner as the capital; and any surplus he directed to be laid out in the purchase of lands to be settled in the same manner as his devised estates (which were limited to successive tenants for life with remainders to their respective sons successively in tail). Owing to the refusal of the tenant for life to give the required approval of the plans, the whole of the £20,000 was not expended within twenty-one years from the testator's death. Shadwell, V.-C., held that accumulation was not restricted by the Thelluson Act to twenty-one years from the testator's death (p). The direction as to accumulation was, he said, mere surplusage and incidental to the direction to build a house,—a work which must occupy some time (q).

Accumulation at the discretion of the trustees, or upon a contingency.

Where the accumulated fund is limited so as to vest within the legal period.

The fact that the amount of income to be accumulated is at the discretion of the trustees, or that the accumulation is directed to be made upon a contingent event, does not take the case out of the Act (r).

The Act applies whatever the ultimate distinction of the fund may be, and whether it is necessarily alienable within the period allowed by the Rule against Perpetuities, or not. Thus when the direction was to accumulate until a certain sum was raised, with a gift of the sum vesting within the line of perpetuity, it was held that the accumulation must cease at the end of twenty-one years (s).

(o) 12 Sim. 304.

(p) In the course of the argument the Vice-Chancellor appears to have taken a different view.

(q) See also, as to accumulation

"by chance," *supra*, p. 329.

(r) *Matthews v. Kettle*, L. R. 3 Ch. 691; 37 L. J. Ch. 657; *Tench v. Cheese*, *supra*, p. 327.

(s) *Odell v. Brown*, 4 De. G. &

A trust to accumulate the income of property and to pay the accumulations and transfer the property at a time after the limitation of the property itself has vested is nugatory. The *cestui que trust* can stop the accumulation and call for a transfer of the property as soon as he attains twenty-one (*t*). To such a trust the Act has no application. But the case is different where the limitation of the property, and the trust for accumulation, are not to and for the exclusive benefit of the same person (*u*); or where, though entitled to the property at a future time, the donee has no right to an immediate transfer of it. In such a case accumulation must stop at the end of twenty-one years from the testator's death (*x*).

And it seems that a charity may not be entitled to stop the accumulation and to have an immediate transfer, where, if the gift had been to an individual, the individual would have been so entitled (*y*).

The Act was passed before the Union, and therefore does not apply to real estate in Ireland (*z*); or to the will (not affecting lands in England) of a domiciled Irishman.

It applies to a will affecting lands in England, whether freehold or leasehold, and whether the testator's domicile be English or foreign. Thus a testator domiciled in Ireland by his will directed his leaseholds in England to be sold, the proceeds to be invested and the income accumulated beyond the period allowed by the Act. It was held

J. 179; 28 L. J. Ch. 542; and see per Hall, V.-C., *Tewart v. Lawson*, L. R. 18 Eq. 490, 496; 22 W. R. 822.

(*t*) *Saunders v. Vautier*, Cr. & Ph. 240; 10 L. J. Ch. 354; Coventry, V.-C., 2 Dr. & Sm. 470; 13 W. R. 985; *Gosling v. Gosling*, Johns. 265; 5 Jur. N. S. 910; *Hilton v. Hilton*, L. R. 14 Eq. 468, 475.

(*u*) As in *Gott v. Nairne*, 3 Ch.

D. 278; 35 L. T. N. S. 209; *Talbot v. Jevers*, L. R. 20 Eq. 255; 44 L. J. Ch. 646.

(*x*) *Talbot v. Jevers*, *ubi supra*; *Weatherall v. Thornburgh*, 8 Ch. D. 261; 47 L. J. Ch. 658.

(*y*) *Harbin v. Masterman*, L. R. 12 Eq. 559; 40 L. J. Ch. 760. *Sed qu.*

(*z*) *Ellis v. Maxwell*, 12 Beav. 104; 10 L. J. Ch. 363.

The Act does not apply to Ireland.

It applies to the will of a foreigner dealing with land in England.

Chap. XVII. that the Act applied, and that the trust for accumulation was invalid, so far as it extended beyond the period allowed by the Act (*a*).

And to income of rents of foreign land being personal estate of an English testator.

Although the Act does not prevent accumulation of rents of land not in England directed by the will of a domiciled Englishman, it applies to accumulations of such rents, being personal estate of the testator. Thus where rents of land in Ireland were by the will of a testator domiciled in England directed to be accumulated, and to become part of his personal estate, it was held that, though the rents might be added to the personal estate beyond the period allowed by the Act, the income arising from the rents could not be accumulated beyond that period (*b*).

Upon the marriage in Ireland of a domiciled Englishman with the daughter of a domiciled Irishman, funds belonging to the husband, and also funds belonging to the father of the wife, were settled upon trust for accumulation during the joint lives of the husband and wife. It was held that the trust was valid during the life of the husband as to the whole fund. For, so far as it was a settlement by the wife's father, it was an Irish settlement, unaffected by the Thelluson Act; and so far as it was a settlement by the husband the Act allowed accumulation during his life (*c*).

Application of the Act to heritable property in Scotland.

The Act does not apply to heritable property in Scotland disposed of by the will of a testator dying before the 14th of August, 1848 (*d*); but by 11 & 12 Vict. c. 36, s. 41, it applies to such property after that date.

In *Macpherson v. Stewart* (*e*) it was held that a testator could not avoid the Act by directing his property to be laid out in the purchase of lands in Scotland, the rents of which were to be accumulated beyond the period allowed by the Act.

- (*a*) *Freke v. Lord Carbery*, L. R. 9; 30 L. J. Ch. 155.
 16 Eq. 461; 21 W. R. 835. (*d*) 39 & 40 Geo. III. c. 98,
 (*b*) *Ellis v. Maxwell*, *supra*. s. 3.
 (*c*) *Heywood v. Heywood*, 29 Beav. (*e*) 28 L. J. Ch. 177.

The Act cannot be used for the purpose of accelerating the enjoyment of property given by the will; or for the purpose of giving to the will a meaning different to that which it would have borne if the trust for accumulation had been valid (*f*). But it does not prevent immediate payment of the capital to an absolute owner, where the trust for accumulation, though contrary to the Act, is annexed to a gift of the absolute interest, and is liable to be put a stop to by the person who takes the absolute interest (*g*). The effect of the Act was thus stated by Lord Langdale:—"The statute was not intended to operate, and does not operate, to alter any disposition made by the testator. Striking that out, everything else is left as before, and all the other directions of the will, as to the time of payment, substitution, and other contingencies, are to take effect according to the true construction of the will, unaltered by the effect of the statute" (*h*).

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The Act cannot accelerate a gift or alter the meaning of a will.

So where there is a direction to accumulate income, with a power of maintenance out of income during minority, the power is exercisable during the whole of the minority, and after the expiration of the period allowed for accumulation (*i*).

A trust for accumulation to which the Act applies can take effect only during the period and in manner directed by the Act. And it is well settled that the four periods mentioned in the first section are alternative and not cumulative. Accumulation can take place during *one* only of the four periods. Thus a direction to accumulate for twenty-one years from the testator's death, and, afterwards, during the minorities of the donees, was held void beyond the twenty-one years (*k*).

(*f*) *Geen v. Gascoyne*, 4 D. J. & S. 565; 34 L. J. Ch. 268; *Weatherall v. Thornburgh*, 8 Ch. D. 261; 47 L. J. Ch. 658; *Nettleton v. Stephenson*, 3 De G. & Sm. 366; 18 L. J. Ch. 191.

(*g*) See *Harbin v. Masterman*, L.

R. 12 Eq. 559; 40 L. J. Ch. 760; *supra*, p. 333.

(*h*) Per Langdale, M.R., *Eyre v. Marsden*, 2 Keen, 564, 574; 7 L. J. Ch. 220.

(*i*) *Pride v. Fooks*, 2 Beav. 430.

(*k*) *Wilson v. Wilson*, 1 Sim. N.

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The four periods allowed by the Act.

I. "The life or lives of any such grantor or grantors, settler or settlers."

II. "The term of twenty-one years from the death of any such grantor, settler, devisor, or testator."

The terms in which the first period mentioned in the Act is described—"the life or lives of any such grantor or grantors, settler or settlers"—appear to cause no difficulty. Where a husband upon his marriage settled money upon trust to accumulate the income during the joint lives of himself and his wife, it was held that the trust was valid, at least during the life of the husband (*l*).

There have been several decisions with reference to the second period, "the term of twenty-one years from the death of any such grantor, settler, devisor, or testator."

The period begins to run on the morning of the day following the testator's death. Thus, dividends accruing on the twenty-first anniversary of the death are subject to the trust (*m*). And the Apportionment Act (4 & 5 Will. IV. c. 22) carries to the persons for whose benefit the accumulation is directed, that portion of the half-yearly, or quarter's, income which is apportioned to the part of the half-year or quarter which falls within the twenty-one years (*n*). ·

The period of twenty-one years runs continuously from the testator's death, whether accumulation is directed to begin then or at a subsequent day. Thus, where annuities were bequeathed, payable out of income, and subject thereto the income was directed to be accumulated as the annuitants died, it was held that no accumulation could be made beyond twenty-one years from the testator's death (*o*).

A direction to pay out of income premiums on a policy of assurance effected by the testator in his lifetime on

S. 288; 20 L. J. Ch. 365; *Lady Rosslyn's Tr.*, 16 Sim. 391; 18 L. J. Ch. 98.

(*l*) *Heywood v. Heywood*, 29 Beav. 9; 30 L. J. Ch. 155.

(*m*) *Gorst v. Lowndes*, 11 Sim. 434; 10 L. J. Ch. 161.

(*n*) *St. Aubyn v. St. Aubyn*, 1 Dr. & Sm. 611; 30 L. J. Ch. 917.

(*o*) *Att.-Gen. v. Poulden*, 3 Ha.

555; 8 Jur. O. S. 611. See also *Webb v. Webb*, 2 Beav. 493; *Nettleton v. Stephenson*, 3 De G. & Sm. 366; 18 L. J. Ch. 191; *Harbin v. Masterman*, L. R. 12 Eq. 559; 40 L. J. Ch. 760; *Talbot v. Jevvers*, L. R. 20 Eq. 255; 44 L. J. Ch. 646; *Weatherall v. Thornburgh*, 8 Ch. D. 261; 47 L. J. Ch. 658.

another person's life is not a direction to accumulate within the Act. Payment of the premiums may, therefore, be legally directed and made during the whole of the life of the assured, and beyond twenty-one years from the testator's death (*p*). Chap. XVII.

The third period is "during the minority or respective minorities of any person or persons who shall be living or, *en ventre sa mere*, at the time of the death of such grantor, deviser or testator." No difficulty arises on these words. III. "During the minority, &c.," of a person living at the death of the settlor.

A question has arisen as to the fourth period, "during the minority, or respective minorities, only of any person or persons, who, under the uses or trusts of the deed surrender, will, or other assurances directing such accumulation, would, for the time being, if of full age, be entitled unto the rents, issues and profits, or the interest, dividends, or annual produce so directed to be accumulated." It has been doubted whether the persons here referred to include persons unborn at the testator's death. IV. "During the minority, &c.," of a person entitled to the income.

There are dicta to the effect that accumulation during the whole of the minority of a person unborn at the testator's death is illegal (*q*); but the cases appear to decide only that accumulation from the testator's death until a person unborn at the testator's death attains twenty-one is void. If, as is stated by Romilly, M.R., in *Bryan v. Collins* (*r*), the Act prevents accumulation during the whole of the minority of a person unborn at the testator's death, the common clause in wills and settlements annexed to trusts for maintenance of unborn children, directing accumulation during minorities of surplus income beyond what is required for maintenance, is, in part, invalid. It appears, however, that the decisions in *Haley v. Bannister*

(*p*) *Bassil v. Lister*, 9 Ha. 177; 295; *Ellis v. Maxwell*, 3 Beav. 587, 20 L. J. Ch. 641. 597; *Bryan v. Collins*, *infra*.

(*q*) See *Haley v. Bannister*, 4 Mad. 275; *Longdon v. Simson*, 12 Ves. (r) 16 Beav. 14, 17.

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and *Ellis v. Maxwell*, (*ubi supra*), do not go the length stated by the Master of the Rolls; and the better opinion is that accumulation during the minority of unborn persons which, without any direction in the instrument, would take place by operation of law, may be directed by deed or will without offending against the Act (s). And it would seem that the case is the same as to instruments affected by 23 & 24 Vict. c. 145, s. 26, whether the interest of the unborn person is vested, or contingent upon his attaining twenty-one (t); and, as to instruments affected by 44 & 45 Vict. c. 41, s. 43, whether the limitation is such that he would, on attaining twenty-one, be entitled to the intermediate income (u), or not (x).

In *Sidney v. Wilmer* (y) there was a trust to accumulate surplus income during the minority of any person for the time being absolutely or presumptively entitled for life or in tail under the limitations of the will. The will contained limitations in tail in favour of persons unborn at the testator's death. It was not suggested that the trust was affected by the Act.

Devolution of income directed to be accumulated contrary to the Act.
Rents of real estate.

As to the devolution of rents and income directed to be accumulated contrary to the Act, and accruing after the period allowed by the Act, the law is as follows:—

In the case of real estate the heir at law, or the residuary devisee, is entitled to the rents, according as the testator died before or after the 1st of January, 1838 (z); if there is no residuary devisee, or if the testator died before 1838, the heir at law is entitled (a). The interest which the

(s) See 1 Jarman on Wills, 4th ed. 304, 305; 3 Dav. Peced. 3rd ed. 178, note (i); *ib.* 470, note (o); *ib.* vol. 4, 330, note (d).

(t) See 4 Dav. Peced. 3rd ed. 330, note (d).

(u) As in *In re Cotton*, 1 Ch. D. 232; 45 L. J. Ch. 201.

(x) As in *In re George*, 5 Ch. D. 837; 46 L. J. Ch. 670.

(y) 4 De G. J. & S. 84.

(z) 1 Vict. c. 26, s. 25.

(a) *Elborne v. Goode*, 14 Sim. 165; 13 L. J. Ch. 394; *Halford v. Stains*, 16 Sim. 488; 13 Jur. O. S. 73; *Nettleton v. Stephenson*, 3 De G. & Sm. 366; 18 L. J. Ch. 191; *Green v. Gascoyne*, 4 D. J. & S. 565; 34 L. J. Ch. 268; *Smith v. Lomas*, 33 L. J. Ch. 578; *In re Drakeley's Estate*, 19 Beav. 395; *Wade Gery v. Handley*, 1 Ch. D. 653; 3 Ch. D. 374; 45 L. J. Ch. 457, 712.

heir takes in the rents passes, if it is a freehold interest not affected by the Wills Act (1 Vict. c. 26, s. 6) to his heir at law (*b*); otherwise to his legal personal representatives (*c*). If the interest taken by the heir is a chattel interest, it passes to his legal personal representatives. A testator devised real estate to trustees in fee, upon trust to accumulate rents until the youngest child of A., by her present or any future husband, attained twenty-one, and then to divide it. After the expiration of twenty-one years from the testator's death, and before the youngest child of A. attained twenty-one, the testator's heir died. It was held that the accumulations beyond twenty-one years from the testator's death passed to the heir at law as a chattel interest, and, upon the heir's death, to the heir's legal personal representatives (*d*).

Where the trust to accumulate rents is in the nature of a charge on the land, and at the end of the statutory period it becomes void under the Act, the persons entitled to the accumulations are those to whom the land is devised subject to the charge. A testator directed rents to be accumulated until £3000 was raised, and subject thereto he devised the real estate to successive devisees for life and in tail. It was held that, at the end of twenty-one years from the testator's death, the devisees were entitled to the land free from the trust for accumulation (*e*).

The case is different when the accumulation is of income of a sum already existing as a charge on the land. There income accruing after the statutory period passes to the next of kin. A testator, having power to charge real estate, charged it with the payment to trustees, after the death of the survivor of himself and his wife, of £6000 and

(*b*) *Sewell v. Denny*, 10 Beav. 315; *Halford v. Stains*, *ubi supra*.

(*c*) *Halford v. Stains*, *ubi supra*. In *Barrett v. Buck*, 12 Jur. O. S. 771, it was admitted (wrongly) that the excess passed to the heir.

(*d*) *Sewell v. Denny*, *ubi supra*.

(*e*) *Evans v. Hellier*, 5 Cl. & Fin. 114; in the Court below *nom. Shaw v. Rhodes*, 1 M. & Cr. 135; *In re Clulow's Tr.*, 1 J. & H. 639; 28 L. J. Ch. 696.

Chap. XVII. interest, to be held upon such trusts as he should by his will appoint. By his will he directed that the £6000 and interest should form part of his residuary personal estate; and he directed that his residuary personal estate should be invested in the purchase of land; and he directed the trustees to accumulate the rents of the lands so purchased for a period exceeding that allowed by the Thelluson Act. It was held that the interest of the £6000 accruing after the expiration of twenty-one years from the testator's death belonged to the testator's next of kin (*f*).

Income of personal estate, (I) where there is a residuary bequest;

Where there is a residuary bequest income of personal estate (not being residue) directed to be accumulated contrary to the statute, and also income of such accumulations, fall into and become part of the capital of the residue (*g*). But a bequest of residue upon trust, as to part of the income, to accumulate the same during the life of A., and upon A.'s death, as to the residue and the accumulations (after payment of certain legacies), to B., does not carry to B. accumulations beyond twenty-one years from the testator's death which were void under the Act. As to such accumulations there is an intestacy (*h*).

In *Trickey v. Trickey* (*i*) there was a bequest of residuary personal estate upon trust to pay the income to the testator's daughter for her life, and, after her death, upon trust as to capital and income for the daughter's children. There followed a proviso that if the income exceeded £200 the surplus should accumulate for the children. It was held that the daughter was entitled to the whole of the income (whatever the amount) after twenty-one years from the testator's death; she being the

(*f*) *Simmons v. Pitt*, L. R. 8 Ch. 978; 43 L. J. Ch. 267.

(*g*) *Haley v. Bannister*, 4 Mad. 275; *In re Drakeley's Estate*, 19 Beav. 395; *Jones v. Maggs*, 9 Ha. 605; 22 L. J. Ch. 90; *Ellis v. Maxwell*, 3 Beav. 587; *Crawley v. Crawley*, 7 Sim. 427; 4 L. J. Ch.

265; *O'Neill v. Lucas*, 2 Keen, 313. But see *Harbin v. Masterman*, L. R. 12 Eq. 559; 40 L. J. Ch. 760.

(*h*) *Weatherall v. Thornburgh*, 8 Ch. D. 261; 47 L. J. Ch. 658; see also *Talbot v. Jevers*, L. R. 20 Eq. 255; 44 L. J. Ch. 646.

(*i*) 3 M. & K. 560.

person who would have been entitled if the accumulations had not been directed. Chap. XVII.

Where there is no residuary bequest the income of personal property directed to be accumulated, and accruing after the expiration of the statutory period, passes to the next of kin (*k*). And the next of kin take income of residuary personalty accruing after the expiration of the statutory period (*l*). Money charged on land, of which the income is, by an instrument executed after that creating the charge, directed to be accumulated, is for this purpose personal estate (*m*). But the residuary legatee, and not the next of kin, will take such income, where the trust for accumulation is annexed to a previous absolute gift of the residue, for life, or otherwise (*n*). (2) Where there is no residuary bequest.
Or the income is of residue.

Income of a fund consisting partly of real and partly of personal property, the accumulation of which is contrary to the Act, passes to the heir at law or next of kin, or to the residuary devisee or legatee, according to the character of the property from which it arises (*o*). Income of a mixed fund.

Income of real estate directed to be sold for the purposes of the will only passes to the heir at law (*p*).

A trust for accumulation contrary to the Act which follows an absolute gift of the property for life, or otherwise, is simply void; and the absolute gift takes effect, and carries the income to the donee, as if the trust to accumulate beyond the statutory period were struck out (*q*). Person entitled to excessive accumulations when an absolute gift is followed by direction to accumulate contrary to the Act.

(*k*) *Pride v. Fooks*, 2 Beav. 430.

(*l*) *McDonald v. Bryce*, 2 Keen, 276; 7 L. J. Ch. 173; *Elborne v. Goode*, 14 Sim. 165; 13 L. J. Ch. 394; *Eyre v. Marsden*, 2 Keen, 564; 4 M. & Cr. 431; 7 L. J. Ch. 220; *Oddie v. Brown*, 4 De G. & J. 179; 28 L. J. Ch. 542; *Matthews v. Keble*, L. R. 3 Ch. 691; 37 L. J. Ch. 8, 657; *Talbot v. Jevers*, L. R. 20 Eq. 255; 44 L. J. Ch. 646; *Weatherall v. Thornburgh*, 8 Ch. D. 261; 47 L. J. Ch. 658.

(*m*) *Simmons v. Pitt*, L. R. 8 Ch. 978; 43 L. J. Ch. 267.

(*n*) See *Trickey v. Trickey*, 3 M. & K. 560; *Combe v. Hughes*, 34 L. J. Ch. 344; 34 Beav. 127; 2 D. J. & S. 657.

(*o*) *Eyre v. Marsden*, 2 Keen, 564; 4 M. & Cr. 431; 7 L. J. Ch. 220; *Talbot v. Jevers*, L. R. 20 Eq. 255; 44 L. J. Ch. 646; *Ralph v. Carrick*, 5 Ch. D. 984; 11 Ch. D. 873; 40 L. T. N. S. 505.

(*p*) *Eyre v. Marsden*, *ubi supra*; *In re Drakeley's Estate*, 19 Beav. 395.

(*q*) *Trickey v. Trickey*, 3 M. & K. 560; *Combe v. Hughes*, 34 Beav. 127; 2 D. J. & S. 657; 34 L. J. Ch.

Chap. XVII.

A testator bequeathed his residuary estate to his two sons and his daughter in equal shares. He directed that the sons' shares should be paid to them as soon as convenient; but that the daughter's share should not be paid to her, and that the income of her share should be accumulated during the life of her husband; and upon the death of the husband her share and the accumulations were to be held upon certain trusts by the will declared. It was held that the daughter was entitled to the income at the expiration of twenty-one years from the testator's death, and during the remainder of the husband's life (*r*).

Devolution of
income of
accumula-
tions.

Income accruing, after the expiration of twenty-one years from the testator's death, from accumulations, follows income accruing after the same period from the property itself. Thus income of accumulated rents of real estate passes to the residuary devisee or the heir-at-law (*s*). Income of accumulations of personal property, not being residue, passes to the residuary legatee or next of kin. Where rents of real estate are directed to be accumulated and added to the personal estate, the income of accumulations will follow the income of the personalty.

Where the
property is
settled.

If the residue is bequeathed for life, with remainder over, the question arises whether the tenant for life is entitled to such income absolutely, or whether it must be invested, and the income of the investments paid to the tenant for life. There appears to be some doubt as to this. In *Crawley v. Crawley* (*t*) and *O'Neil v. Lucas* (*u*) the latter course seems to have been adopted; in a recent case (*x*) Malins, V.-C., held that there could be no investment of the income, and that the tenant for life of the residue took it as income as it accrued due.

344; and see *supra*, pp. 319, 333, as to the right of a person absolutely entitled to stop accumulation.

(*r*) *Combe v. Hughes*, *ubi supra*;
and see *Trickey v. Trickey*, *ubi supra*.

(*s*) *Eyre v. Marsden*, 2 Keen, 569,

577; 4 M. & Cr. 431; 7 L. J. Ch. 220.

(*t*) 7 Sim. 427; 4 L. J. Ch. 265.

(*u*) 2 Keen, 313, 316.

(*x*) *In re Phillips*, *Phillips v. Levy*, 49 L. J. Ch. 193.

Where a legacy of £5000 with accumulations was bequeathed to A. contingently on her marriage, and the residue was given to B. for life, remainder over, it was held that income arising beyond twenty-one years from the testator's death and in A.'s lifetime from accumulations made in B.'s lifetime belonged to B. or her legal personal representatives; and that income arising from accumulations made after B.'s death belonged to the legatee in remainder of the residue (y). Chap. XVII.

In *Bryan v. Collins* (z) £1400 was bequeathed in trust to accumulate for the eldest daughter of A., payable at twenty-one or marriage, and if no daughter of A., for the eldest daughter of B., payable in like manner. A. never had a daughter and died forty-two years after the testator. B. had a daughter who died an infant eighteen years after the testator. It was held by Romilly, M. R., (following *Morgan v. Morgan*) that upon the death of A., B.'s daughter's representatives were entitled to the £1400 and accumulations made before the death of the daughter, with simple interest on the whole to the day of payment.

In *Trickey v. Trickey* (a) and also in *Combe v. Hughes* (b), where the direction to accumulate followed an absolute gift of residue for life, the tenant for life was held to be entitled to the income of accumulations as well as the income of the residue itself after the expiration of the twenty-one years.

By the second section of the Act provisions for payment of debts, for raising portions, and with regard to the produce of timber, are excepted from the operation of the Act. With regard to the exception in favour of debts, Lord St. Leonards was of opinion that the effect of the Act is "that a man may by his will provide for the debts

Exceptions from the Act:
(1.) Provisions for the payment of debts.

(y) *Morgan v. Morgan*, 20 L. J. Ch. 109, 441; 4 De G. & Sm. 164.
(z) 16 Beav. 14.

(a) *Ubi supra*.
(b) *Ubi supra*.

Chap. XVII. of himself or anyone else within the old limit" (c); differing from Turner, V.-C., who had held that the words "or other person or persons" were to be read in the sense, that a testator, settlor, or any other person may provide for his own debts. In *Matthews v. Keble* (d), Page Wood, and Selwyn, L.JJ., took the view of Lord St. Leonards, that provisions for payment of other persons' debts are within the exception. In *Varlo v. Faden* (e) future liabilities, in respect of a share in a newspaper bequeathed by the will, were held to be within the exception. The Rule against Perpetuities requires that a trust to accumulate for the payment of the debts of a person other than the settlor or testator must be restricted in its operation to a life or lives in being and twenty-one years after. It seems that there is no limit for the duration of a trust to accumulate for payment of the settlor's or testator's own debts (f). The debts spoken of in the Act are future as well as existing debts (g).

The trust must be *bonâ fide* for the purpose of paying debts. If accumulation is directed in all events, and the direction for payment of debts applies only in certain events (h); or if the trust is to accumulate rents, not for the purpose only of paying debts, but for that purpose or, in case they are paid by sale or foreclosure of the land, for the purpose of raising a sum equal in amount to the value of the land sold or foreclosed, the trust is not within the exception of the second section (i). In the last mentioned case, if the debts are paid by sale of the land, accumulation will not continue in order to recoup the corpus (k).

A trust to set apart so much of the rents of real estate

(c) *Barrington, Lord, v. Liddell*, 2 D. M. & G. 480, 498; 22 L. J. Ch. 1.

(d) L. R. 3 Ch. 691, 698; 37 L. J. Ch. 657.

(e) 27 Beav. 255; 1 D. F. & J. 211; 29 L. J. Ch. 230.

(f) *Supra*, p. 316.

(g) *Barrington v. Liddell, Varlo v. Faden, ubi supra*.

(h) *Matthews v. Keble, ubi supra*.

(i) *Tewart v. Lawson*, L. R. 18 Eq. 490; 22 W. R. 822.

(k) *Tewart v. Lawson, ubi supra*.

as in fifteen years will amount to £30,000, followed by a charge of that sum on the land, is not a trust to accumulate to pay debts within section 2 (*l*). Chap. XVII.

The second exception from the operation of the Act is in respect of accumulations for "raising portions for any child or children of any person taking any interest under such conveyance settlement or devise." These words have caused much difficulty. The subject of the exception is doubtful. "Portions" is a word "a precise definition of which no judge has ventured to give" (*m*). It has been held that it does not mean a gift to the chance survivor of the children of a class of persons taking a small interest under the will (*n*); but it includes portions already created (*o*) as well as portions created by the instrument itself (*p*). A direction to accumulate income of a specified sum (*q*), or of the residue (*r*), or the whole (*s*) of the testator's estate for a specified period, and then to transfer the capital and accumulations to the children of a person named, is not within the exception as a trust for raising portions. (2.) Provisions for raising portions.

Middleton v. Losh (*t*) must be mentioned as conflicting with these cases. There Stuart, V.-C., held that a trust to accumulate so much of the income of a pecuniary legacy as was not required for the support of A., and to divide the capital and accumulations, on A.'s death, amongst A.'s children, was within the exception of the

(*l*) *Evans v. Hellier*, 5 C. & F. 114.

(*m*) Per Kindersley, V.-C., *Watt v. Wood*, 1 Dr. & Sm. 56, 60; 31 L. J. Ch. 338.

(*n*) *Burt v. Sturt*, 10 Ha. 415, 426.

(*o*) *Halford v. Stains*, 16 Sim. 488; 13 Jur. O. S. 73; *Barrington v. Liddell*, 2 D. M. & G. 480, 499; 22 L. J. Ch. 1.

(*p*) *Beech v. Lord St. Vincent*, 3 De G. & S. 678; 19 L. J. Ch. 130.

(*q*) *Jones v. Maggs*, 9 Ha. 605; 22 L. J. Ch. 90; *Watt v. Wood*,

ubi supra.

(*r*) *Bourne v. Buckton*, 2 Sim. N. S. 91; 21 L. J. Ch. 193; *Edwards v. Tuck*, 3 D. M. & G. 40; 22 L. J. Ch. 523; 23 L. J. Ch. 204; *Burt v. Sturt*, 10 Ha. 415; 22 L. J. Ch. 1071; *Matthews v. Keble*, L. R. 3 Ch. 691; 37 L. J. Ch. 8, 657.

(*s*) *Edwards v. Tuck*, *ubi supra*; *Wildes v. Davies*, 1 Sm. & G. 475; 22 L. J. Ch. 495.

(*t*) 1 Sm. & G. 61; 22 L. J. Ch. 422.

Chap. XVII. second section. The Vice-Chancellor appears to have relied, wrongly, on *Barrington v. Liddell* as an authority in point (*u*).

A trust to accumulate for portions of children of a person who never has any children is void beyond the statutory period (*x*). But a trust to accumulate for portions of children, if there are any, and, if not, for other persons is good or bad, according to the result (*y*).

It seems that the words describing the parent of the child whose portion may be accumulated—"taking any interest, &c."—do not refer only to the particular property of which the income is to be accumulated (*z*). Any interest taken under the will, however small or remote, and whether in the property to be accumulated or not, appears to be sufficient (*a*).

If the portions are for a class of children, the trust will not be within the exception of section 2, unless all the members of the class are children of persons taking an interest under the will (*b*).

(3.) Directions touching the produce of timber.

By the second section of the Act it is provided that nothing therein shall extend to any directions concerning the produce of timber (*c*). This exception probably originated, partly in the fact that the produce of timber is not usually dealt with as annual income of the land, and partly in a desire to encourage the planting and growth of timber for naval purposes (*d*). No case has arisen with reference to the exception of timber. It appears that a trust to accumulate profits arising from timber for the whole of the period allowed by the Rule

(*u*) See per Kindersley, V.-C., 114, 126.
2 Dr. & Sm. 60.

(*x*) *In re Chulow's Tr.*, 1 J. & H. 639; 28 L. J. Ch. 696.

(*y*) *In re Chulow's Tr.*, *supra*.

(*z*) *Barrington v. Liddell*, 22 L. J. Ch. 1; 2 D. M. & G. 480; *Burt v. Sturt*, 10 Ha. 415, 420; 22 L. J. Ch. 1071.

(*a*) *Evans v. Hellier*, 5 Cl. & F.

114, 126.
(*b*) *Eyre v. Marsden*, 2 Keen, 564, 573; *Burt v. Sturt*, *ubi supra*.

(*c*) Cf. Pepy's Memoirs, quoted in Hargreaves on the Thelluson Act, p. 206: "Timber is an excrescence of the earth, provided by God for the payment of debts."

(*d*) Cf. Hargreaves on the Thelluson Act, p. 206.

against Perpetuities is still valid; and that an accumulation may, in this way, be devised as extensive as that directed by the Thelluson will (e). Chap XVII.

In *Eyre v. Marsden* (f) it was held that the costs of an action resulting in a declaration that accumulation was directed contrary to the Act should be borne by the general estate of the testator, and not entirely by the part consisting of illegal accumulations. But costs of separating excessive accumulations, where they had been allowed by the persons entitled to be mixed with other funds, were, in *Ralph v. Carrick* (g), thrown on the excessive accumulations.

(e) See per Preston, *arguendo*, *Bengough v. Edridge*, 1 Sim. 173, 247; *Dorchester v. Effingham*, 3 Beav. 180, note; G. Cooper, 319; *Ferrand v. Wilson*, 4 Ha. 344; 9 Jur. O. S. 360; *Briggs v. Earl of Oxford*, 1 D. M. & G. 363; 21 L. J. Ch. 829; as to trusts relating to

the produce of timber.

(f) 4 M. & Cr. 231; followed in *Barrett v. Buck*, 12 Jur. O. S. 771; 11 L. T. O. S. 352.

(g) 5 Ch. D. 984; 11 Ch. D. 873; 40 L. T. N. S. 505. See, also, *Green v. Gascoyne*, 4 De G. J. & S. 565; 34 L. J. Ch. 268, as to such costs.

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